SUPREME COURT, U.S.
FILED

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In the

Supreme Court of the United States

GLADSTONE FORD,

Petitioner,

-against-

NEW YORK CITY TRANSIT AUTHORITY (NYCTA); MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY (Mabstoa); and BARBARA M. ROTH, ESQ.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

PROCEDURE - FEDERAL STATUTE INTERPRETATION

(1) Is it within the Scope of Authority or judicial discretion of the District Court and the 2nd Circuit to refuse to allow Petitioner to file an independent action pursuant to FRCP Rule 60(b) to investigate and determine fraud upon the court?

(2) Is it a proper exercise of judicial discretion for the courts below to convert Petitioner's fee paid Complaint pursuant to FRCP Rule 60(b) into a Motion to Reconsider the judgement in an underlying case (after the expiration of the period for filing such a motion, and after the Notice of Appeal) without notice, a hearing, or taking of evidence concerning whether fraud upon the court had occurred?

(3) Does the explicit behavior of the Respondents attorney, Barbara Roth, who, inter alia, misrepresents material factual issues to the District Court and the 2nd Circuit, upon which those courts rely to dismiss Petitioner's Complaint, rise to the level of misconduct (attorney misconduct providing "special circumstances") such as would warrant relief pursuant to FRCP Rule 60(b)?

FRCP RULE 56(e) - SUMMARY JUDGEMENT

(4) Does an Order of the District Court barring further submissions by a party with a statutory obligation to come forward with material, disputed facts pursuant to the above rule constitute a violation of due process and an abuse of discretion?

(5) And, as a corollary, does such an Order (barring further submissions) insulate from punishment, as a matter of law, any attorney misconduct that occurs prior to the date of the Order?

PROCEDURE - FEDERAL STATUTE INTERPRETATION

(6) Is "Clean Hands" or freedom from procedural defect or default a pre-condition to reporting fraud upon the court pursuant to FRCP Rule 60(b)?

CONSTITUTIONAL LAW - FULL FAITH AND CREDIT

(7) Is the "Full and Fair Opportunity to Litigate" test for the attachment of Full Faith and Credit appropriately based upon a void, default state court judgement?

And, the narrower question is, does a federal Court declaration that a state court judgement is void require reversal of the state court proceedings as the 2nd Circuit has ruled? Or, does such declaration merely prohibit the void judgement from importation into federal jurisdictions, leaving the state court proceedings in full force and effect within the state of origin?

CONSTITUTIONAL LAW - EQUAL PROTECTION OF LAW

(8) Is there a systemic bias in the administration of Disciplinary Rules in the 2nd Circuit which favors a certain cadre of attorneys to the disadvantage of others?

PARTIES TO THE PROCEEDING

(a) Petitioner is an African-American attorney and a non-practicing member of the United States Supreme Court Bar.

(b) Respondents New York City Transit Authority (hereinafter "NYCTA") and Manhattan & Bronx Surface Operating Authority (hereinafter "Mabstoa") are wholly owned subsidiaries of the Metropolitan Transit Authority (hereinafter "MTA") a quasi-governmental agency with transit operating divisions in each of the five (5) boroughs of the City of New York.

(c) Respondent Barbara M. Roth, Esq., is an attorney associated with the TORY law firm in New York City, and represented NYCTA, Mabstoa, and herself before the District Court, and the 2nd Circuit in the above captioned action.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2004

GLADSTONE FORD, Petitioner Pro Se

-against-

NEW YORK CITY TRANSIT AUTHORITY (NYCTA);
MANHATTAN AND BRONX SURFACE TRANSIT
OPERATING AUTHORITY (Mabstoa); and
BARBARA M. ROTH, ESQ.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CITATION TO OPINION BELOW

The final Order of the U.S. Court of Appeals appears in the Appendix hereto (Appendix# 1,2,3).

STATEMENT OF JURISDICTION

The Court of Appeals for the 2nd Circuit entered its final Order on December 2, 2003.

STATUTORY PROVISIONS INVOLVED

FORD v. NYCTA; MABSTOA;and BARBARA M. ROTH, Esq.
U.S. DISTRICT COURT CIVIL ACTION# 03cv0869 –
2ND CIRCUIT DOCKET# 03cv7430:

(a) The U.S. Supreme Court has jurisdiction to hear this matter because it involves the review of the final decisions of a Federal District Court and a U.S. Circuit Court of Appeals involving a federal question; construction of United States statutes and denial of rights thereunder; and, due process of law and equal protection of laws pursuant to U.S. Constitution, Amendment XIV, Section 1.

(b) The original action was brought as an independent action pursuant to FRCP Rule 60(b)(3)&(6); 28 USC 1331; and 42 USC 2000e-5(f)(3). Pursuant to FRCP Rule 60(b)&(6), ancillary jurisdiction, established in Civil Action# 98cv4768, was retained by the courts below to determine whether they had been victims of a fraud. Pursuant to 28 USC 1391(b) venue lay in the Eastern District of New York.

FORD v. NYCTA and MABSTOA
U.S. DISTRICT COURT CIVIL ACTION# 98cv4768 –
2ND CIRCUIT DOCKET# 01cv9091

(c) The U.S. Supreme Court has ancillary jurisdiction to review this case pursuant to jurisdiction established in the lower courts pursuant to FRCP Rule 60(b).

(d) The above captioned action was commenced pursuant to Title VII of the Civil Rights Act of 1964 (42 USC Sec. 2000e, etc.); the New York State Human Rights Law (Executive Law Sec. 296, etc.); and Administrative Code of the City of New

York (New York City Civil Rights Law Sec. 8-107(1)(a).

FORD v. IRS; DIME SAVINGS BANK, et al
U.S. DISTRICT COURT CIVIL ACTION# 00cv3301 –
2ND CIRCUIT DOCKET# 02cv6022

The above captioned matter may be considered by the Supreme Court because it is a companion case to the cases under review.

(e) The U.S. Supreme Court has jurisdiction to entertain a final decision of the U.S. Court of Appeals (2nd Circuit);

(f) Jurisdiction in the lower courts was grounded upon: FRCP Rule 60(b); and Rule 12(b)(1)(6);28 USC 1331& 1738; Administrative Procedure Act, 5 USC 702,etc.; Declaratory Judgement Act, 28 USC 2201&2202.

STATEMENT OF THE CASE

1. Petitioner makes this application for a Writ of Certiorari from the final Order of the U.S. Court of Appeals for the 2nd Circuit (Docket# 03-7430) dated December 2, 2003, as follows:

U.S. DISTRICT COURT CIVIL ACTION# 98cv4768 –
FORD v. NYCTA and MABSTOA.

2. On August 5, 1998, Petitioner (represented by the law firm of Thomas F. Bello, Esq.) filed a complaint in Federal District Court for the Eastern District of New York against Respondents (represented by Barbara M. Roth, Esq.) being Civil Action #98cv4768 which suit arose from unlawful employment discrimination practiced by the Respondents' white male managers against Petitioner concerning promotion, pay and conditions of employment because of Petitioner's

race, and further employment discrimination in the form of retaliation for complaining thereof.

3. Petitioner's suit also alleged that Respondents white male managers practiced unlawful employment discrimination against similarly situated white female managers on the basis of gender (female managers were successful in their suits against the same white male managers who exercised a discriminatory animus against Petitioner). See Zerelli v. NYCTA, (E.D.N.Y., 1997), 973 F. Supp.. 311, (Nina Gershon, U.S.D.J.); affirmed 2nd Circuit; and Belfi v. Prendergast, (2nd Cir.) 191 F3rd 129, 140.

4. Civil Action# 98cv4768 was assigned to Sterling Johnson, Jr., U.S.D.J.

5. On September 25, 2000, Respondents' attorney, Barbara M. Roth, Esq., filed a Motion for Summary Judgement (and ancillary papers and correspondence with the District Court) in opposition to Petitioner's Employment Discrimination Complaint in Civil Action# 98cv4768), in which she: (a) falsely stated that Petitioner had produced no evidence whatsoever in support of his claims; (b) that Petitioner had refused to comply with Respondents' document demand during the course of discovery, (c) that the U. S. EEOC had dismissed Petitioner's charges; and, (d) Ms. Roth had suborned perjury by Frederick L. Herman (NYCTA manager alleged to have committed unlawful discriminatory acts against Petitioner) in the submission of his "Affidavit in Further Support of Defendants' Motion for Summary Judgement". (However, evidence that Petitioner submitted specific controverted material factual issues to the District Court in response to all of Respondents' document demands pursuant to Magistrate Go's Discovery Order of October 15, 1998, is attached to "Complaint" in Civil Action# 03cv0869, in Exhibit# 8, page 1; Internal exhibit "B"; and part 3).

6. On November 3, 2000, the District Court (Sterling Johnson, Jr. J.) filed an Order which prohibited Petitioner from any further submissions to the District Court because of procedural delays attributed to Petitioner's counsel, Thomas F. Bello.

7. Thereafter, Petitioner's counsel, Thomas Bello, was unable to respond to Barbara Roth's misrepresentations to the District Court concerning Petitioner's document production or proffer the statutorily required defense against the Respondents' Rule 56(e) Motion for Summary Judgement. Accordingly, Barbara Roth was able to exploit the District Court's Order of November 3, 2000, (barring further submissions by Petitioner) to advance her scheme to defraud the Federal Courts herein since Judge Johnson's Order shielded her misrepresentations from scrutiny by the respective Federal Courts. (See Appendix# 4).

8. Consequently, the District Court, relying entirely upon the Respondents attorney's misrepresentations, found that the Petitioner produced no evidence to support any of his claims; that Petitioner had withheld documents demanded by Respondents during Discovery; that Petitioner, a lawyer, was not qualified for promotions for which he applied as were the successful candidates (white male Bus Operators/Mechanics with High School Diplomas), and granted the Respondents' Motion for Summary Judgement in an Order dated June 8, 2001. (See Appendix# 2).

9. The 2nd Circuit Court of Appeals, in a decision dated Aug. 21, 2002, affirmed the District Court's Summary Judgement Order finding that no evidence existed in the District Court record to support Petitioner's claims since the 2nd Circuit could not review the trial court's finding of fact, and was precluded, on appeal, from considering the 1,000 plus pages of Petitioner's evidence Barbara Roth was successful in

suppressing because such evidence, the 2nd Circuit ruled, was "not contained" in the District Court record. (2nd Circuit Docket# 01-9091).

10. Petitioner herewith incorporates by reference the full record in 2nd Circuit Docket# 01-9091.

U.S. DISTRICT COURT CIVIL ACTION# 00cv3301 - FORD v. IRS, DIME SAVINGS BANK OF NY, et al.

11. In a related case, because it involved damages flowing from the abovementioned circumstances, Petitioner commenced an independent action pursuant to FRCP Rule 60(b), to challenge a report to the U.S. Treasury Department Internal Revenue Service ("IRS") that the Dime Savings Bank of New York, FSB, and Ocwen Federal Bank, FSB, had "forgiven a mortgage debt" allegedly owed them by Petitioner of $172,668.00 Dollars based upon a void, default New York State Supreme Court Judgement of Foreclosure dated June 24, 1994. (NYS Sup. Ct. Index# 21189/93).

12. The premise of the Federal litigation was that the IRS was without subject matter jurisdiction over the "res" or debt because its assessment of Federal Income Tax was based upon a NYS Supreme Court Foreclosure Judgement which is void.

13. However, Petitioner's Complaint did not challenge the merits, but only the validity of the NYS Judgement on the ground that, if void, Full Faith & Credit would prohibit its introduction into any Federal jurisdiction (including the IRS), and, as a corollary, the Rooker-Feldman Doctrine could not be applied to a void NYS Judgement.

14. The NYS Supreme Court Foreclosure Judgement was void because it was obtained by fraud upon the NYS Supreme Court. To wit, that Dime Savings Bank Attorney, John Panagopoulos, filed a false instrument (Request for

Judicial Intervention), under oath, with the NYS Supreme Court Clerk in which he perjured himself to conceal the facts that: (a) the foreclosure action was commenced approximately two (2) years after the New York State Statute of Limitations had expired; (b) there was a prior Judgement which entitled Petitioner to the preclusionary effect of Res Judicata regarding the issues that the challenged judgement purported to decide. (See NYS Sup. Ct. Index# 18165/86, same parties/same issues/same mortgage).

15. Civil Action# 00cv 3301(SJ) was assigned to Sterling Johnson, Jr., U.S.D.J.

16. Judge Johnson dismissed the Complaint in the abovementioned action pursuant to the Rooker-Feldman Doctrine, ruling that the District Court did not have jurisdiction over the subject matter because the cause of action represented "an attempt to appeal the NYS Supreme Court Judgement".

17. Petitioner appealed, but the 2nd Circuit, in a decision dated November 8, 2002, and on rehearing May 20, 2003, affirmed the District Court's Order of September 17, 2001, holding that:

> "The teachings of Rooker-Feldman and its progeny require this Court to affirm the district court's dismissal of Ford's action against Dime and Ocwen. Ford's claims regarding the alleged fraud and the statute of limitations with respect to the foreclosure judgement are inextricably intertwined with the state court's underlying foreclosure judgement. See Phifer v. City of New York., 289 F3rd 49,55 (2d Cir. 2002). In essence, Ford seeks a declaration that the foreclosure judgement is void, thereby requiring reversal of the state court foreclosure judgement." (2nd Cir. Docket# 02-6022)

18. Moreover, the 2nd Circuit held, regarding the void,

default, NYS Judgement of Foreclosure, Petitioner is barred by the Rooker-Feldman doctrine from litigating the Constitutional issues (ie., Full Faith and Credit, etc.) of the challenged NYS Foreclosure Judgement because he had a "full and fair opportunity to litigate" these issues in NYS Supreme Court even if due process and equal protection of the laws were denied and the Judgement that resulted was void and a default. (Citing as authority the 2nd Circuit's own decision in Phifer v. City of New York, (Ibid.).

19. The 2nd Circuit in Ford v. IRS, et al, applies an "full and fair opportunity to litigate" test to determine the admitability into federal jurisdiction commerce of state court judgements.

20. According to the 2nd Circuit, the sole inquiry or criterion for determining admitability of a state court judgement into federal jurisdiction is whether the party challenging the state court judgement had a "full and fair opportunity to litigate" in the state court.

21. This uniphase litmus test was applied in the above captioned case and the result was that a void, default New York State foreclosure judgement was permitted access to commerce in the federal jurisdiction.

22. Applying the same approach as sanctioned by the 2nd Circuit, if a Massachusetts court recognized the same sex marriage of a couple regarding property located in New York, and the matter came up in federal court, the only inquiry of the 2nd Circuit would be "did the challenging party have an opportunity to fully litigate in the Massachusetts court, and having found so would theoretically give federal jurisdiction access to the Massachusetts judgement – thereby making same sex marriage legal in the United States.

23. The 2nd Circuit in this instance would completely disregard the fact that as decided in the above case (Ford v.

IRS) that the Massachusetts judgement would be invalid in New York and that would violate the Full Faith and Credit clause of the U. S. Constitution and the federal statute defining marriage as a union between a man and a woman.

24. The foregoing does not describe the intention of the Full Faith and Credit, nor the federal statute invalidating same sex marriage, it is simply an example of judge made law.

25. Petitioner herewith incorporates by reference the full record in 2nd Circuit Docket# 02-6022.

U.S. DISTRICT COURT CIVIL ACTION# 03cv 0869 – FORD v. NYCTA; MABSTOA; and BARBARA ROTH

26. Subsequently, Petitioner filed a new Complaint dated February 21, 2003, in an independent action pursuant to FRCP Rule 60(b)(3)& (6), alleging fraud upon the District Court, and complaining of misconduct by Respondents' (NYCTA and Mabstoa) attorney Barbara Roth.

27. Petitioner's Complaint alleged that Barbara Roth made assertions to the District Court and the Court of Appeals that were knowingly false; that those statements were intended to conceal and suppress material facts as part of a consciously perpetrated scheme to defraud the District and Appellate Courts; and, that those false statements were relied upon, to Petitioner's detriment, by the Federal Courts herein.

28. Civil Action# 03cv 0869 was assigned to Sterling Johnson, Jr., U.S.D.J.

29. On April 1, 2003, Judge Johnson ruled, sua sponte, (and without notice, a hearing, or taking proof to determine whether fraud had been perpetrated on the Court) that Petitioner's independent action pursuant to FRCP Rule 60(b), etc. was "erroneously opened as a new case" by the Clerk's Office; and converted the Complaint in said action to a Motion for Reconsideration of his June 8, 2001 Order that

granted Summary Judgement in Ford v. NYCTA, et al (Civil Action# 98cv4768(SJ), after the case had been appealed to the 2nd Circuit (2nd Circuit Docket# 01-9091); then Judge Johnson denied the putative "motion" as untimely. Additionally, the "(District) Court direct(ed) the Clerk of Court to close the new case, 03-CV-0869, and to docket the instant submission under 98-CV-4768." (See Order, page 1, Civil Action# 03cv0869(SJ), Appendix# 1).

30. The 2nd Circuit Court of Appeals, which permitted Barbara Roth to represent both herself and the other Respondents on appeal (despite being a potential witness, and, despite such dual representation being condemned by the Code of Responsibility (PDR 5-101,102&105) as a Conflict of Interest), affirmed the District Court's Order in a decision dated December 2, 2003.
(2nd Cir. Docket# 03-7430).

31. This Petition for Certiorari arises from the final decision of the U.S. District Court in Ford v. NYCTA; MABSTOA; and Barbara Roth, Esq., (Civil Action# 03cv0869), its appeal to and final decision of the U.S. Court of Appeals (2nd Circuit Docket# 03-7430), the underlying and companion cases as detailed above.

REASONS FOR GRANTING THE WRIT

POINT 1

It is error and an abuse of judicial discretion for the District Court and 2nd Circuit to convert Petitioner's FRCP Rule 60(b) independent action complaining of fraud upon the court into a Motion to Reconsider the grant of Summary Judgement in a prior action and dismiss the putative "motion" as untimely, without notice, a hearing or taking proof of charges of fraud perpetrated upon the Court.

Discretion of the Court

32. In this case, Judge Johnson, sua sponte, converted Petitioner's independent action, commenced February 21, 2003, pursuant to FRCP Rule 60(b) into a Motion for Reconsideration of a June 8, 2001 Order granting Summary Judgement in a prior employment discrimination action (Ford v. NYCTA, et al., Civil Action# 98cv4768(SJ); then Judge Johnson denied the putative motion as untimely without notice or a hearing to determine whether fraud had been perpetrated on the Court.

33. As is recognized by the Federal Courts, a petition for relief from a judgement under Rule 60(b) is addressed to the discretion of the court. (Creswell v. Sullivan & Cromwell, (2nd Cir.,1990), 922 F2d 60, at page 71).

34. As a result, a District Court has discretion to grant or deny relief under FRCP Rule 60(b). However, the court's discretion is not a capricious or arbitrary one, it is limited by the following important legal principles:

THE DISTRICT COURT'S EXERCISE OF DISCRETION IS LIMITED BY:

(1) FRCP Rule 60(b) which is remedial in nature, and, therefore, must be liberally construed, so that any case presenting a question of substantial rights should be resolved in favor of a petition to set aside the judgement, when Petitioner has not been afforded an opportunity to have his case decided on the merits after a fair hearing, which presupposes an opportunity to present all facts available in support of his position. (Steel Company v. Citizens For A Better Environment, (1988), 523 US 83);

(2) well established precedent that judgements obtained by fraudulent practices and perjured testimony are to be vacated as a matter of law (they are void and never become final, (Toscano v. Commissioner of internal Revenue, (9th Cir, 1971), 441 F2d 930);

(3) by the fact that the District Court exercising his discretion without notice, a hearing or taking of proof of fraud upon the court, took Petitioner by surprise, a result not intended by FRCP Rule 60(b), and that Petitioner had the right to know on what procedural grounds the District Court was deciding the case.

(4) by fact that doubt should be resolved in favor of an action to set aside judgement so that cases may be decided on their merits, and only after a careful study of all the relevant considerations should a court refuse to open a judgement obtained by fraud;

(Enron Oil Corp v. Diakuhara, (2nd Cir.1993), 10 F3rd 90,96; Hadden v. Ramsey, (2nd Cir.1952), 196 F2d 92); International Controls Corp v. Vesco, (2nd Cir. 1977), 556 F2d 665; Panama Process, SA v. Cities Service Co., (2nd Cir.1986), 789 F2d 991).

CONSTITUTIONALLY DEFECTIVE ABUSE OF DISCRETION

35. Accordingly, it is an abuse of discretion and Constitutional deprivation of due process for the District Court not to grant relief pursuant to Rule 60(b), as a matter of law, were indisputable evidence accompanied by a statement of clear and convincing probative facts supported elements of fraud upon the court. (Kotlicky v. U.S. Fidelity & Guaranty Co., (2nd Cir.1987), 817 F2d 6, 7 Fr. Serv. 3rd 353).

36. Furthermore, it certainly is a constitutionally defective abuse of judicial discretion, as a matter of law, to deny Petitioner the benefit of the statutory safeguards provided by Rule 60(b)
[ie., liberal construction, discourage fraud upon the court, etc.] compounded by the denial of Constitutional safeguards of notice, a hearing, or taking of proof of charges of fraudulent misrepresentation and concealment. (Hadden v. Ramsey Products, (supra).

37. The Constitutional defect occasioned by the foregoing abuse of discretion occurs when the unwarranted exercise of discretion does not simply deprive Petitioner of an opportunity to present evidence in a particular instance, but is so egregious that it results in the deprivation of the Constitutional safeguards of due process and equal protection of the law such that Petitioner has never had his day in court.

(U.S. Constitution, Amendment XIV, Section 1).

POINT II

FILING OF NOTICE OF APPEAL AS AFFECTING JURISDICTION OF DISTRICT COURT TO, SUA SPONTE, CONSIDER A MOTION TO RECONSIDER

38. The filing of the Notice of Appeal generally divests the District Court of jurisdiction over the case. Therefore, any order by the District Court pertaining to the merits of the judgement and entered after the appeal has been taken is of no effect. Thus, the District Court in this instance has no jurisdictional basis for a Motion to Reconsider or reopen Ford v. NYCTA, et al., (Civil Action# 98cv4768(SJ), on the merits, after jurisdiction had been given up to the 2nd Circuit. (Judicial Code Title 28 USC Sec.1295 (c) - "the U.S. Court of Appeals shall have exclusive jurisdiction ... of an appeal from a final decision of a District Court of the United States." Exception: Rule 60(b) does provide a statutory jurisdiction to the District Court to reopen cases on appeal, but only for the limited purpose of investigating complaints concerning fraud upon the court.

POINT III

WHAT CONSTITUTES FRAUD UPON THE COURT: BARBARA ROTH'S MISREPRESENTATIONS; AN UNCONSCIONABLE PLAN OR SCHEME; THE INVOLVEMENT OF AN OFFICER OF THE COURT(EXTRORDINARY CIRCUMSTANCES); DISTRICT COURT'S RELIANCE UPON BARBARA ROTH'S MISREPRESENTATIONS; "CLEAN HANDS" DOCTRINE DOES NOT APPLY; MERITORIOUS CLAIM.

39. The record contains indisputable evidence that Barbara Roth's assertions to the Federal Courts herein regarding the Respondents' Summary Judgement motion were misrepresentations of fact, known by her to be false, and were part of an unconscionable plan or scheme to defraud by concealing controverted, material facts from consideration by the District Court and the 2nd Circuit, to wit:

(1) Suppression of Evidence – Barbara Roth's statements that "Ford had produced no evidence..." were false since Respondents were in receipt of, and, Ms. Roth knew that Petitioner had produced "more than 1055 pages" of documents containing material facts which supported Petitioner's case on July 15, 1999, pursuant to Magistrate Marilyn D. Go's Discovery Order of October 15, 1998. (See Thomas F. Bello, Esq. "Affidavit", in "Complaint" [03cv0869], Exhibit# 8, page 1; and, Evelyn Jonas, Esq. Letter to Thomas F. Bello, Esq. dated December 17, 1999, "Complaint" [03cv0869], Exhibit# 8 (internal exhibit "B"; and Exhibit# 8, part 3).

(2) Barbara Roth used an unspecified quantity of the materials she told the Federal Courts did not exist, as a basis of proof in her own submissions. (See B. Roth "Reply Memorandum of

Law in Support of Defendants' Motion for Summary Judgement" (Petitioner's "Complaint" [03cv0869], Exhibit# 4(b), page 1);

(3) Misrepresentation of Facts - (a) "Petitioner failed or refused to respond to document demands made by Respondents during discovery concerning certain "notes" and "records". B.Roth Memorandum in Support of Motion for Summary Judgement, pages 19-20), See "Complaint" [Ibid.]. Contradictory, however, is Barbara Roth's associate, Todd L. Schleifstein, Esq. "Letter dated February 14, 2000", acknowledging receipt of supplemental document delivery from Petitioner in response to Respondents discovery demand in "Complaint" [03cv0869], Exhibit# 7. (b) "... the U.S. Equal Employment Opportunity Commission ("EEOC") had dismissed Ford's multiple charges of Discrimination against the Transit Defendants...." (B. Roth's "Brief" on appeal, page 2, Docket# 01-9091; Memorandum of Law in Support of Motion for Summary Judgement, "Complaint" [03cv0869] Exhibit# 1, page 9, para. 77). However, in refutation, the EEOC Right to Sue Letter obtained by Petitioner unequivocally states that: "This is your Notice of Right to Sue.... it has been issued at your request..." And, "The EEOC is terminating the processing of this charge." (see Petitioner's "Right to Sue Letter" issued by the EEOC April 20, 1998, which contradicts Barbara Roth's misrepresentations. ("Complaint" [03cv0869], Exhibit# 2).

(4) Subordination of Perjury - in the solicitation of (NYCTA, Staten Island Division manager) Frederick Herman's "Summary Judgement Affidavit" in which he testifies under oath to Petitioner's job qualifications and job applications to other corporate entities about which F. Herman had no personal knowledge as required by FRCP Rule 56 (Summary Judgement). See "Affidavit in Further Support of Defendants'

Motion for Summary Judgement" in "Complaint" [03cv0869], Exhibit# 5, para. 2,3&5-8, pages 1&2, and, remarkable is B. Roth's admission: "Candidate selections, including promotions... are made by different people in different departments, divisions and corporate entities..." B.Roth "Memorandum of Law in Support of Defendants' Motion for Summary Judgement", see "Complaint" [03cv0869], Exhibit# 4(a), page 14);

EXTRAORDINARY CIRCUMSTANCES – Involvement of an Officer of the Court

40. Judge Johnson's Order dated November 3, 2000 - Barbara Roth's scheme to defraud the Federal Courts herein was advanced by her exploitation of the District Court's Order dated November 3, 2000, which prohibited Petitioner from any further submissions to the District Court. (Nov 3, 2000 Order in Appendix# 4). Barbara Roth exploited Judge Johnson's Order to shield her misrepresentations from scrutiny by the Federal Courts, since Petitioner was unable to controvert misrepresentations made by her to the District Court or proffer proofs in support of Petitioner's defense to Respondents' Summary Judgement Motion from November 3, 2000, [the date of Judge Johnson's Order barring further submissions by Petitioner], through June 8, 2001, [the date when Judge Johnson issued his Order granting Respondents' Motion for Summary Judgement].

41. Thus, Petitioner did not have a "full and fair opportunity to litigate" the issue of fraud upon the court in the underlying case [98cv4768]. (Klapprott v. United States, 335 U.S. 601,613-614).

42. Moreover, Barbara Roth, an attorney and officer of the court, involvement in the above described scheme to defraud the Federal Courts herein, meets and exceeds the

requirement of extraordinary circumstances warranting relief.

43. An attorney's loyalty to the court, as a officer thereof demands integrity and honest dealing with the court, and, when she departs from that standard, she perpetrates a "fraud upon the court" within the savings clause of the rule governing relief from judgement or order. (FRCP Rule 60(b)(3)(4)&(6).

44. The preceding principle applies to cases of fraud upon the court, because the proscription in Rule 60(b), is not that an attorney may lie to a federal Court: if the lie is ineffective; or if the attorney's adversary has an opportunity to rebut the lie; or that an attorney may lie to a Federal Court where his/her adversary is guilty of some defect or default – the proscription of Rule 60(b)(4)&(6) is that an attorney may not lie to a Federal Court, - period. (Kuperferman v. Consolidated Research & Mfg. Corp., (2nd Cir,1972), 459 F2d 1072; Kenner v. Commissioner of Internal Revenue, (7th Cir.,1968), 387 F2d 689,691, Cert. Denied 89 S.Ct. 121,393 U.S. 841; Toscano v. Commissioner of Internal Revenue, (9th Cir., 1971), 441 F2d 930; Hazel-Atlas Glass Company v. Hartford Empire Co., Post).

CLEAN HANDS DOCTRINE

45. Furthermore, it is noteworthy that the equitable principle of "clean hands" is not a pre-condition to reporting fraud upon the court or maintaining an independent action under the saving clause of FRCP Rule 60(b). Thus, whatever procedural delays or defects Petitioner's attorney, Thomas Bello, Esq., was liable for in the District Court does not translate into a bar to Petitioner maintaining an independent action alleging fraud upon the court as the 2nd Circuit suggests. (Martina Theatre Corp. v. Schine Chain Theatres, Inc. (2nd Cir,1960), 278 F2d 798,801).

46. Accordingly, an attorney and officer of the court, Barbara Roth, involvement in the abovedescribed scheme to defraud the Federal Courts herein meets and exceeds the requirement of extraordinary circumstances warranting relief, and abrogates the need for such considerations as "opportunity to litigate" or "Clean Hands". (Klapprott v. United States, 1949, 69 S.Ct. 384,389, 335 U.S. 601,613-614).

MERITORIOUS CLAIM

47. Petitioner, using the McDonnell Douglas (Burdine) Model, is able to demonstrate that the "more than 1055" pages of documents produced by Petitioner during discovery (ie., the suppressed evidence), could indisputably support his claim in general, and more specifically, would have been sufficient to defeat the Respondents' Summary Judgement Motion in the District Court and the 2nd Circuit.

POINT IV

PUBLIC POLICY CONSIDERATION AND CONSTITUTIONAL PRINCIPLES

48. Petitioner unquestionably has a meritorious claim, but has been consistently thwarted in his efforts to demonstrate and support the merits of his claim with the "more than 1055 pages" of documentation which Barbara Roth has successfully concealed from the District Court in Civil Action# 98cv4768, and the 2nd Circuit in Docket# 01-9091.

49. Furthermore, Petitioner's inability to persuade the Federal Courts herein is directly attributable to the misconduct of NYCTA attorney, Barbara Roth, whose misrepresentations and concealment pursuant to her plan to improperly influence the Federal Courts herein has so completely distorted the judicial

process that in fairness and good conscience the judgement should not be permitted to stand, and relief should be granted.

50. Moreover, in Ford v. ABC (Alleged "Blacklisting" of Petitioner by ABC through the use of negative employment references after Petitioner had resigned to re-take the Bar Examination) , Petitioner was victimized by the same tactics that Barbara Roth has implemented in Ford v. NYCTA, et al. In that case, ABC attorney Ronald Green, Esq. (firm: Becker, Borsody & Green) misrepresented to the District Court, Pierre N. Leval, under oath, that Petitioner had refused to disclose the contents of a FBI Background Report during Discovery. Judge Leval dismissed Petitioner's case as a sanction.

51. On appeal to the 2nd Circuit, Petitioner produced a transcript of an ABC deposition taken of Petitioner during discovery two (2) years prior, in which Ronald Green, on the record, read line by line from the same FBI Background Report he swore to Judge Leval that Petitioner had refused to produce. The 2nd Circuit changed the theory of the District Court's decision and affirmed on the basis of a Freedom of Information Act privilege asserted by Petitioner in the same deposition. (The FOIA privilege Petitioner asserted pertained to only "16 pages" of the FBI Background Report and is designed to protect irrelevant interviews with friends and neighbors from public scrutiny). Approximately two (2) months after the 2nd Circuit decision, ABC was sold to Capital Cities Broadcasting, Inc. for 2.2 Billion Dollars. (Ford v. American Broadcasting Company, Inc., (SDNY, 1983), 101 F.R.D. 664,667; U.S. Court of Appeals 2nd Circuit, Docket# 83-7797; Writ of Cert. U.S. Supreme Court, denied).

52. The pattern of deceptions practiced by Barbara Roth (TORYS), Ronald Green (Becker Borsody & Green), and John Panagopolous (Rivkin Radler & Kremer) in order to defraud the Federal Courts herein is not merely a violation of

trust, but a public policy violation because its impact is far greater than the detriment to Petitioner, since such conduct tends to erode the public confidence in the capacity of the Federal Courts to render impartial judgements. (Hazel-Atlas Glass Company v. Hartford Empire Co., 1944, 64 S.Ct 997, 1003-1004, 322 U.S. 238, 250-251).

53. Moreover, the judicial process appears to have broken down outrageously when Federal Courts in other Circuits, have found it appropriate to severely punish the President of the United States, William Jefferson Clinton, for similar misconduct while the cadre of lawyers herein are able to commit perjury, or other misconduct, and misrepresent facts in the Federal Courts of the 2nd Circuit confident in the knowledge that no harm will come to them, their clients or their reputations because the cases against them will be dismissed.

54. Finally, a large part of judicial economy is the incentive on the part of litigants to settle their disputes without the need for trials. However, the policy of the 2nd Circuit removes that incentive, and creates judicial economy in one direction only, in favor of the abovementioned attorneys, and at the expense of the litigants who oppose them.

55. Dismantling Constitutional safeguards and usurping or overriding the Legislative function, albeit in the name of judicial economy, is not a proper conduct of the judicial function.

CONCLUSION

WHEREFORE, Petitioner prays the Court to grant the foregoing petition, remand the case for trial, and for such other and proper relief the Court deems necessary and appropriate.

Dated: February 25, 2004
Brooklyn, New York

Respectfully Submitted,

Gladstone Ford
Petitioner pro Se
821 Hancock Street, Apt. 1L
Brooklyn, New York 11233
Tel: (718) 573-3052

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

_____X

GLADSTONE FORD,

Plaintiff,

ORDER
03-CV-0869 (SJ)

-against-

NEW YORK CITY TRANSIT AUTHORITY (NYCTA), MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY (MABSTOA), BARBARA M. ROTH, ESQ.,

Defendants.

_____X

JOHNSON, J.:

Plaintiff, appearing *pro se,* filed this complaint as an "independent action brought pursuant to [Fed.R.Civ.P.] 60(b)(3) & (6)." Compl. ¶ 10. The instant action was erroneously opened as a new case and assigned a new civil docket number. It should have been filed as a motion under Fed.R.Civ.P. 60(b) seeking reconsideration of this Court's Order, filed June 8, 2001, dismissing Ford v. New York City Transit Authority, et al., No. 98 CV 4768 (SJ). The Court directs the Clerk of Court to close the new case, 03-CV-0869, and to docket the instant submission under 98-CV-4768. For the following reasons, plaintiff's motion is denied.

Plaintiff brought this action in 1998 against New York

City Transit Authority ("NYCTA") and Manhattan and Bronx Surface Operating Transit Authority ("MaBSTOA") alleging defendants discriminated against him based on his race in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000-e et seq., the Equal Pay Act, 29 U.S.C. §§ 206(d) and 215(a)(2), the New York State Human Rights Law, and Title 8 of the Administrative Code of the City of New York. See Order, filed June 8, 2001, Ford v. New York City Transit Authority, et al., No. 98 CV 4768 (SJ), at 1. Plaintiff was hired by MaBSTOA, a statutory subsidiary of NYCTA, in March 1989, as a Manager of Labor Relations for the Staten Island Division, Department of Buses. Id. at 2. He alleged that defendants failed to promote him and wrongfully terminated him based on discrimination and retaliation. Id. This Court granted defendants' motion for summary judgment pursuant to Fed.R.Civ.P. 56, and dismissed plaintiff's complaint. Id. at 20.

Plaintiff now alleges that defendants' counsel in that action, Barbara Roth, committed fraud by uttering "false, misleading" statements that were "designed to conceal material facts from consideration by the District Court." Compl. ¶ 5. In particular, plaintiff alleges that Roth concealed documents produced by plaintiff during the course of discovery, "subordinat[ed]" perjury, and misrepresented that plaintiff had refused to comply with discovery requests. Id. at ¶ 7. Plaintiff claims that Roth's actions constituted a "willful perpetration of an unconscionable plan ... to defraud the District Court. Id. at ¶ 8. Plaintiff alleges that he is entitled to relief pursuant to Rule 60(b)(3) & (6). Id. at ¶ 10.

Fed.R.Civ.P. 60(b) provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party .. From a final judgment [or order] for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence ... ; (3) fraud ... misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released., or discharged ... or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reason (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken.

Plaintiff contends that the Court should vacate its judgment dismissing the complaint based on defendants' fraud pursuant to Rule 60(b)(3). However, plaintiff's motion on this ground is time-barred. A motion under 60(b)(3) must be made within one year. The judgment dismissing plaintiff's complaint was entered on June 8, 2001. Therefore, the instant motion is untimely.

Plaintiff's motion does not warrant relief from judgment under Rule 60(b)(6), which has no specific time limit. This section may only be invoked when the asserted grounds for relief are not recognized in clauses (1) through (5) of the rule. See Nemaizer v. Baker, 793 F.2d 58, 63 (2d Cir. 1986). Because plaintiff's asserted grounds for relief are recognized in 60(b)(3), plaintiff cannot avail himself of the "reasonable time" provision of 60(b)(6) to avoid the one-year time bar. See, e.g., Serzysko v. Chase Manhattan Bank, 461 F.2d 699, 701 (2d Cir. 1972).

Accordingly, plaintiff's motion for relief from the Court's judgment is denied. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal would not be taken in good faith and therefore *in forma pauperis* status is denied for purpose of an appeal from this Order. Coppedge v. United States, 269 U.S. 438, 444-45 (1962).

SO ORDERED.

Dated: Brooklyn, New York
April 1, 2001

s/ STERLING JOHNSON, JR., USDJ

FILED
In Clerk's Office
U.S. District Court, E.D.N.Y.
April 4, 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 2nd day of December, two thousand and three.

PRESENT:

HON. GUIDO CALABRESI,
HON. BARRINGTON D. PARKER, JR.,
HON. REENA RAGGI,

Circuit Judges.

GLADSTONE FORD,

Plaintiff-Appellant,

No. 03-7430

v.

NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY, BARBARA M. ROTH, Esq.,

Defendants-Appellees.

For Plaintiff-Appellant: GLADSTONE FORD, Brooklyn, NY *(pro se)*

For Defendants-Appellees: BARBARA M. ROTH, Torys LLP New York, NY

Appeal from the United States District Court for the Eastern District of New York (Johnson, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District court be and it hereby is **AFFIRMED.**

In 1998, Plaintiff-Appellant Gladstone Ford brought a Title VII race discrimination and retaliation claim against his former employer, the New York City Transit Authority and the Manhattan and Bronx Surface Operating Authority. The district court granted summary judgment to the defendants after concluding that Ford had demonstrated no issues of material fact supporting either claim. In August 2002, we affirmed the district court's judgment by summary order. *See Ford v. New York City Transit Author.*, 43 Fed. Appx. 445 (2d Cir. 2002).

In February 2003, Ford returned to the United States District Court for the Eastern District of New York, seeking relief from the previous judgment by filing what he styled a "complaint" and an "independent action brought pursuant to [Fed.R.Civ.P.] 60(b)(3) & (6)." Ford alleged specifically that the defendants' attorney, Barbara Roth, committed a fraud upon the district court by (1) falsely informing the district court that Ford's EEOC charges had been dismissed, (2) soliciting an affidavit that Ford alleges included false statements, and (3) misrepresenting the adequacy of Ford's evidence and his efforts to comply with discovery. The district court characterized this "complaint" as a Rule 60(b) motion and denied it.

> Federal Rule of Civil Procedure 60(b) provides, in relevant part:
>
> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ...(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; ...or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made

> within a reasonable time, and for reasons, (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken....This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, ...or to set aside a judgment for fraud upon the court.

If characterized as a 60(b)(3) motion, Ford's claim would be time-barred, because it was brought more that one year after the June 2001 summary judgment. An "independent action" based upon "fraud upon the court" may, however, be brought at any time, *see Gleason v. Jandrucko,* 860 F.2d 556, 558 (2d Cir. 1988), so long as it is not barred by the doctrine of laches, *see Simons v. United States,* 452 F.2d 1110, 1116 (2d Cir. 1971).

But Ford has alleged no facts that could support such an action. Appellees committed no wrong by informing the district court that the EEOC had "dismissed" Ford's charges. It is commonplace to refer to an EEOC right to sue letter as a dismissal. *See, e.g., Elmenayer v. ABF Freight System, Inc.,* 318 F.3d 130, 133 (2d Cir. 2003). Even if the affidavit to which Ford objects included false statements – for which we see no evidence – that would not suffice to support a claim of fraud upon the court. *See Gleason,* 860 F.2d at 559. And the appellees' argument below that "the record contains absolutely nothing other than Ford's self-serving speculation and surmise to support his claims" does not misconstrue or "suppress" the evidence produced by Ford – it merely attests to the appellees' ' belief that such evidence was insufficient to support Ford's claim. Although Ford insists that the appellees lied by stating that he had failed to produce certain notes in response to discovery, he provides us with no evidence that he did in fact produce the documents in question. Finally, even had there been misrepresentations by the appellees regarding Ford's

evidence or compliance with discovery at this stage, Ford could have raised this issue in his opposition to summary judgment.

Ford has thus not shown that he "had no opportunity to litigate the allegations of fraud on the court" in the previous proceeding. *Weldon v. United States,* 70 F.3d 1, 5 (2d Cir. 1995). He has also offered no evidence that the appellees committed any fraud or misrepresentation at all, much less the heightened form of "fraud which seriously affects the integrity of the normal process of adjudication" which is the predicate of an action under the savings clause of Rule 60(b). *Gleason,* 860 F.2d 559. We have considered all of the appellant's claims and find them meritless.[1] We therefore AFFIRM the judgment of the district court.

For the Court,

ROSEANN B. MACKECHNIE

Clerk of the Court

By: s/ Lucille Carr

FILED
United States Court of Appeals, Second Circuit
December 2, 2003

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[1] The appellees request that we enjoin the plaintiff from bringing any further similar actions against them. After considering the factors outlined in *Safir v. U.S. Lines, Inc.,* 792 F.2d 19, 24 (2d Cir. 1986), we conclude that Ford's conduct does not rise to the level of "vexatious" or "harassing," and therefore decline to impose sanctions upon him.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
_____X

GLADSTONE FORD,

Plaintiff, 98 CV 4768 (SJ)

-against- **MEMORANDUM AND ORDER**

NEW YORK CITY TRANSIT
AUTHORITY AND MANHATTAN
AND BRONX SURFACE
TRANSIT OPERATING AUTHORITY,

Defendants.
_____X

APPEARANCES:

THOMAS F. BELLO, ESQ.
387 Forest Avenue
Staten Island, NY 10301
Attorney for Plaintiff

TORYS
237 Park Avenue
New York, NY 10017
By: Barbara M. Roth, Esq.
Attorneys for Defendants
JOHNSON, District Judge:

Plaintiff Gladstone Ford("Plaintiff") brings this action against Defendants New York City Transit Authority ("NYCTA") and Manhattan and Bronx Surface Transit Operating Authority ("MaBSTOA") alleging violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000-e et seq. ("Title VII"), the Equal Pay Act, 29 U.S.C. §§ 206(d) and 215(a)(2) ("EPA"), the New York State Human Rights Law, and Title 8 of the Administrative Code of the City of New York. Presently before the Court is Defendants' motion for summary judgment. For the following reason, Defendants' motion is granted.

BACKGROUND

Plaintiff was hired by MaBSTOA, a statutory subsidiary of NYCTA[1], in March 1989, as a Manager of Labor Relations for the Staten Island Division, Department of Buses. In this capacity, Plaintiff was responsible for handling disciplinary and contract interpretation grievance appeals and arbitrations, as well as administering labor relations matters and labor contracts for the Staten Island Division. During Plaintiff's five years of employment at MaBSTOA, numerous complains were filed by Plaintiff's fellow employees alleging that Plaintiff's performance was deficient. (Herman Aff. Ex. 3.) Also during that time, Plaintiff applied for a total of ten different management positions in efforts to gain a promotion. Plaintiff was not hired for any of the ten positions. On March 25, 1994,

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[1]Defendant NYCTA is a public benefit corporation existing pursuant to the New York State Public Authorities Law §1201 et seq. Defendant MaBSTOA, a public benefit corporation under the New York State Public Authorities Law §1203-a, is a subsidiary of NYCTA that operates certain bus lines for the City of New York. The two authorities are separate legal entities.

Plaintiff took a leave of absence from the MaBSTOA, claiming symptoms of job-related stress, and never returned to work. Plaintiff was terminated May 23, 1995, pursuant to company policy. Plaintiff, who is Black, alleges that Defendants' failure to promote Plaintiff and his subsequent termination were discriminatory and retaliatory employment actions.

Plaintiff's Attempts to Gain Promotion

Beginning in 1991, Plaintiff applied for a variety of positions at the highest levels of NYCTA and MaBSTOA management. The first position for which Plaintiff claims he applied was that of Assistant General Manager, Administration, Staten Island Division. Plaintiff allegedly applied for the job in March 1991 and asserts in his Complaint that Frederick Herman, a veteran NYCTA employee who is currently General Superintendent in the Quality Performance Unit of the Department of Buses of NYCTA, was eventually awarded the position. (Herman Aff. ¶ 1). Defendants contend, however, that due to reorganization, the position was eliminated that same year, prior to being filled. (Herman Aff. Ex. 11.)

On July 8, 1991, Plaintiff applied for the position of Chief Electrical Officer, a high-level management post. The Chief Electrical Officer assumes responsibility for all aspects of the complex signal, power distribution, and communication systems for the vast subway system operated by the NYCTA. (Herman Aff. Ex. 14.) Furthermore, the position entails management of 2,700 employees and an annual budget of $300 million. (Id.) Plaintiff was not offered the position. Defendants assert that Plaintiff was not qualified for this job, a claim that Plaintiff does not refute. (Defendant's Rule 56.1 Statement of Undisputed Facts ("Def. 56.1 Stmt") ¶ 33.) The position was filled in December 1991 by an NYCTA employee who had previously held the position of Chief Mechanical Officer in the

Car Equipment Division and was otherwise qualified for the position. (Def. 56.1 Stmt. ¶ 34.)

On April 7, 1992, Plaintiff applied for the position of Senior Director, Labor Research and Negotiations. This position remained open until 1995, at which time Plaintiff was no longer available for work. Plaintiff also claims that he applied for a Senior Director Labor research position (Compl. ¶ 30.) However, Defendants contend, and Plaintiff's 56.1 Statement does not refute, that there was no such job opening. (Def. 56.1 Stmt. ¶ 44.)

On May 28, 1992, Plaintiff applied for the position of Labor Counsel, which Plaintiff was aware had been posted by the Metropolitan Transportation Authority ("MTA"), rather than by MaBSTOA or NYCTA. (Roth Aff. Ex. 1 at 67.) The MTA is a separate entity from NYCTA or MaBSTOA and Defendants played no role in applicant selection for any MTA position. (Def. 56.1 Stmt. ¶ 47.) Plaintiff was not selected by the MTA for the Labor Counsel position.

Plaintiff states in his Complaint that, on September 14, 1992, he applied for the position of director, Surface Transit, a high-level business management position within NYCTA. (Compl. ¶ 31.) Plaintiff later stated in his deposition testimony, however, that he does not recall applying for that position. (Roth Aff. Ex. 1 at 67.) The Director, Surface Transit position required experience which Plaintiff did not possess, and was filled in December 1992 by an NYCTA employee whose credentials matched the job qualifications. (Def. 56.1 Stmt. ¶ 51-52; Herman Aff. Exs. 5, 23.)

On October 20, 1992, Plaintiff applied for the position of General Manager, Bronx Division with the NYCTA. The General Manager was responsible for the delivery of all transportation services in the Bronx, including the maintenance, administration and operations of multiple bus depots overseeing more than 700 buses, and management of a more

than $85 million budget. (Herman Aff. Ex. 24.) Plaintiff was not hired for that position. The successful candidate was previously the Acting Manager of the Bronx Division and had more than 20 years of experience in the transit industry. (Herman Aff. Ex. 25: Def. 56.1 Stmt. At 56.)

On May 10, 1993, Plaintiff applied for an Assistant General Manager position with Staten Island Rapid Transit Operating Authority ("SIRTOA"), a subsidiary of the MTA. Selection for this post required ten years of specialized operational, mechanical, administrative, and regulatory railroad experience. (Herman Aff. Ex. 27.) Plaintiff did not meet these qualifications and was not awarded the position. (Herman Aff. Ex. 5.) The position was subsequently eliminated in a corporate reorganization. (Herman Aff. ¶ 10.)

On August 18, 1993, Plaintiff applied for the high-level position of General Manager, Surface Transit, Staten Island. The General Manager is responsible for transportation, maintenance, administration, and operation of all the buses on Staten Island, and oversees a more that $85 million operating budget. (Herman Aff.Ex. 30.) Plaintiff possessed none of the qualifications for this job and was not hired for the position. The successful candidate had been employed by NYCTA since 1977 in a variety of bus and subway management positions. (Herman Aff.Ex. 31.)

On January 20, 1994, Plaintiff applied for the position of Director, Labor Relations. This position was essentially the same post held by Plaintiff in Staten Island, but served a larger borough. Althea Richardson, a black female, accepted the position. Unlike Plaintiff, Ms. Richardson was licensed to practice law in New York, which was a requirement for the job. (Herman Aff., Ex. 33, ¶ 11.)

Plaintiff's Job Performance

During his several years of employment with MaBSTOA, Plaintiff initially received satisfactory reviews, however, those reviews slowly declined. At the end of Plaintiff's first full year on the job, in March 1990, Plaintiff received a rating of "fully satisfactory"[2] during his performance evaluation. (Herman Aff., Ex. 8.) The next year, plaintiff again received a "fully satisfactory" rating. (Herman Aff., Ex. 9.) Plaintiff did not file a timely charge of discrimination with the Equal Employment Opportunity Commission ("EEOC Charge") concerning either of these reviews.

In 1992, Plaintiff's performance was again reviewed and deemed "fully satisfactory." The review, however, criticized Plaintiff's conduct at an arbitration hearing in which Plaintiff was representing Staten Island bus management, and characterized that conduct as having "bordered on ...incompetent." (Herman Aff. Ex. 16.) Plaintiff filed a written response to this evaluation and refused to sign it.

A year later, in March 1993, Plaintiff's performance was rated as "poor".[3] (Herman Aff. Ex. 26.) The review cited missed deadlines, lack of responsiveness to other managers and to unions, failure to follow instructions, unauthorized time off,

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[2] At that time, employee evaluations were based on a four-tier scale: "extraordinary," "superior," "fully satisfactory," and "less than fully satisfactory." The next year, however, the rating system was changed to a five-level system with the following ratings: "extraordinary," "superior," "fully satisfactory," "marginally satisfactory," and "less than fully satisfactory." (Herman Aff., Ex. 9.)

[3] The ratings had been changed to a new four-tier system of: "excellent," "good," "marginal," and "poor."

and poor preparation for hearings and arbitrations as the impetus for the rating. (Id.)

Plaintiff's Termination

On March 25, 1994, Plaintiff left work after suffering what he believed to be a heart attack, but was in fact a stress-related action. (Roth Aff. Ex. 1 at 73-77.) Plaintiff was absent from work for a period of 13 months. At the end of that time, MaBSTOA gave Plaintiff notice that, pursuant to company policy, he would be terminated as of May 23, 1995 if he did not return to work. (Herman Aff. Ex. 4.) Plaintiff did not return to work and was terminated.

Plaintiff's EEOC Claims

On February 9, 1993, Plaintiff filed the first of two EEOC charges naming NYCTA. (Roth Aff. Ex. 2.) That charge alleged that Plaintiff had always received "good" evaluations until his "new" General Manager was assigned. The first EEOC charge alleged that under his new manager, Plaintiff had received "non-satisfactory" evaluations that led to denials of promotions and denials of pay increases and that such denials were based on Plaintiff's race. (Id.)

After leaving his job in March 1994, Plaintiff filed a second EEOC charge on April 14, 1994. In the second charge, Plaintiff alleged that he had been subjected to racial discrimination and retaliation. Specifically, Plaintiff claimed that since filing his initial charge, he had been denied two promotions, excluded from staff meetings, received declining performance evaluations, and threatened with demotion and/or termination. (Roth Aff. Ex. 5.) Following his termination, on July 6, 1995, Plaintiff added to his first EEOC charge, a claim that he was terminated because of his race and in retaliation for

filing complaints and "opposing discrimination." (Roth Aff. Ex. 6.)

The EEOC dismissed Plaintiff's charges on April 20, 1998, and Ford commenced this action on July 16, 1998. (Def. 56.1 Stmt. ¶ 77.) In his Complaint, Plaintiff alleges: 1) Title VII violations of discriminatory failure to promote, discriminatory termination, and retaliation; 2) EPA violations, stating that Defendants pay "caucasian employees at rates lower that the rates at which is pays wages to African-American employees..." (Compl. ¶ 60.); and 3) racial discrimination claims under New York State Human Rights Law and Title 8 of the Administrative Code of the City of New York.

Defendants filed the instant summary judgment motion claiming that following discovery, Plaintiff cannot raise any genuine, disputed issue of material fact in support of his claims. Defendants assert that there is no evidence to support Plaintiff's claims of racial discrimination. Defendants further argue that Plaintiff's EPA claim is not actionable, Plaintiff's termination claim is meritless because Plaintiff has testified that he cannot work, and Plaintiff's retaliation claims are barred by his failure to offer admissible evidence in support of those claims. Finally, Defendants argue that Plaintiff's claims against MaBSTOA are barred by Plaintiff's failure to name that entity in any EEOC charge.

DISCUSSION

I. Summary Judgment Standard

Summary judgment is appropriate when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-50

(1986).The burden is on the movant to establish the absence of any material factual issues, and the facts must be construed in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Summary judgment should be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Sim v. New York Mailers' Union Number 6, 166 F.3d 465, 469 (2d Cir. 1999). "If reasonable minds could differ as to the import of the evidence," summary judgment is inappropriate. Anderson, 466 U.S. at 250.

Once the moving party has made a properly supported motion for summary judgment, the burden shifts to the non-moving party to present "significantly probative" supporting evidence showing that there is a material factual issue for trial. Id. at 249. "The substantive law governing the case will identify those facts that are material, and only those facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. at 248.

II. Equal Pay Act Claim

The EPA, 29 U.S.C. § 206(d), prohibits wage discrimination on the basis of gender. Under the EPA, employers are prohibited from paying wages "at a rate less than the rate at which [they] pay wages to employees of the opposite sex... for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working condition..." 29 U.S.C. § 206(d).

Plaintiff's EPA claim alleges disparate pay based on race, however, the EPA is clearly inapplicable to this case. See

DeCintio v. Westchester County Med. Ctr., 807 F.2d 304, 308 (2d Cir. 1986)(finding that "the fundamental purpose of the Act was to remedy disparities in pay arising from traditional concepts of gender."); Belgrave v. City of New York, 95 cv 1507, 1999 WL 692034, at *24 (E.D.N.Y. Aug. 31, 1999)(finding that "claims under the Equal Pay Act asserting disparities based on...race, or any factor other than sex, must fail,"(citations omitted).

Plaintiff's Complaint does not allege that Defendants engaged in gender bias in the payment of wages. Plaintiff first introduces this claim in his Memorandum in opposition to Defendants' Motion for Summary Judgment, stating in a wholly conclusory fashion that his "salary is clearly below that of females performing the same function." (Mem. In Opp. To Def's Mot. For Summ. J. at 10.) Such allegations are insufficient to create a valid claim. Accordingly, the Court concludes that Plaintiff's EPA claim is without merit.

III. Title VII Claims

A. Time-Barred Claims

In New York, an EEOC charge claiming violation of Title VII is time-barred if not filed within 300 days of the accrual of the claim. 42 U.S.C. § 2000e-5(e). Defendants argue that Plaintiff's Title VII claims, which challenge the rejection of Plaintiff's March 1991 application for the Assistant General Manager, Administration, Staten Island Division position and his July 8, 1991 application for the Chief Electrical Officer position, are time-barred for failure to timely file an EEOC charge. Plaintiff did not file the first charge until February 9, 1993. Defendants further contend that at that time, the statute of limitations had expired for such a claim challenging acts occurring prior to April 15, 1992.

Plaintiff attempts to circumvent the statute of

limitations applicable to these claims by invoking the continuing violation doctrine. The continuing violation exception provides that "a plaintiff who files a timely EEOC charge about a particular discriminatory acts committed in furtherance of an ongoing policy of discrimination extends the limitations period for all claims of discriminatory acts committed under that policy even if those acts, standing alone, would have been barred by the statute of limitations." Lightfoot v. Union Carbide Corp., 110 F.3d 898, 907 (2d Cir. 1997)(citations omitted). The test for a continuing violation is two-fold: a plaintiff must allege both (1) the existence of an *ongoing policy of discrimination* and (2) that a timely act of discrimination was committed in furtherance of such policy. Id. "Discrete incidents of discrimination that are unrelated to an identifiable policy or practice...'will not ordinarily amount to a continuing violation,' unless such incidents are specifically related and are allowed to continue unremedied for 'so long as to amount to a discriminatory policy or practice.'" Id. (quoting Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708, 713 (2d Cir. 1996)).

Plaintiff has satisfied neither prong of this test. Plaintiff has alleged multiple, unrelated events, as opposed to an ongoing policy of discrimination. Plaintiff's promotion denials, negative performance reviews, and eventual termination are the type of actions normally viewed as discrete incidents insufficient to trigger the continuing violation exception. See Wang v. New York City Dep't of Fin., No. 96-cv-5170, 1999 WL 529550, *11 (E.D.N.Y. July 21, 1999)(finding that repeated failure to promote, negative performance evaluations, and ultimate termination did not amount to continuing violation.); Mareno v. Madison Square Garden, 98 Civ. 2718, 1999 WL 777952, *5 (S.D.N.Y. Sept. 29, 1995)" Multiple failures to promote are usually viewed as discrete incidents of discrimination that do not constitute a continuing violation.")

This Court agrees with Defendants' assertion that the statute of limitations has expired for such a claim challenging acts accruing prior to April 15, 1992. As such, Plaintiff's attempt to invoke the continuing violation doctrine must fail and the Court deems Plaintiff's claims relating to the July 8, 1991 and February 9, 1993 job applications are time-barred.

B. Title VII Standard of Review

> Title VII states, in pertinent part, that it is unlawful for an employer:
>
> to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(a).

In cases claiming discrimination under Title VII, a plaintiff must carry the initial burden of establishing a prima facie case of discrimination. Once a plaintiff has proven a prima facie case, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973). After the employer has responded, the employee must be afforded an opportunity to prove the existence of factual issues demonstrating that the stated reasons were merely a pretext for discrimination." Meiri v. Dacon, 759 F.2d 989, 997 (2d Cir. 1985). Accordingly, "a court must enter summary judgment for defendant when the plaintiff (1) fails to put forth a prima facie case, of (2) fails to rebut a defendant's

well-presented, a non-discriminatory reason for the adverse employment action." Wang, 1999 WL 529550 at *12.

C. Discriminatory Failure to Promote Claim

To prove a prima facie case of discriminatory failure to promote, a plaintiff must show: (1) that he belongs to a protected class; (2) that he applied and was qualified for a job for which employer was seeking applicants; (3) that, despite his qualifications, he was rejected: and (4) that, after his rejection, the position remained open and the employer continued to seek applications from persons of complainant's qualifications. McDonnell Douglas Corp., 411 U.S. at 802.

In the instant case, Plaintiff alleges that he applied for ten separate position, and that all of them were given to applicants who "had significantly less seniority, experience and qualifications than Plaintiff...[and] were not African-American." (Compl. ¶ 57.) Plaintiff cannot, however, establish a prima facie case for any of these promotion claims. The court had determined herein that Plaintiff's first two failure promote claims are time-barred. The Court also finds that Plaintiff's remaining eight failure to promote claims are meritless.

Plaintiff claims to have applied for a promotion to Senior Director of Labor Research. Defendants assert that there was no posting for such a job opening. Plaintiff does not address Defendants' contention in his Memorandum in Opposition to Defendants' Motion for Summary Judgment, nor in his Rule 56.1 Statement of Undisputed Facts. Accordingly, Defendants' assertion is deemed admitted and Plaintiff cannot sustain this claim as a matter of law. On May 28, 1992, Plaintiff applied for a Labor Counsel position with the MTA, an agency separate and distinct from either of the Defendant agencies. Defendants assert, and Plaintiff does not refute, that Defendants did not participate in any MTA employment

decision. In light of this fact, Defendants cannot be held responsible for a separate agency's failure to hire Plaintiff. See Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235, 1240 (2d Cir. 1995).

There are four positions for which Plaintiff cannot establish a prima facie case of discriminatory failure to promote because he cannot prove that he was qualified for the jobs or that a less qualified applicant was awarded the positions. These positions are Director, Surface Transit Support; General Manager, Bronx Division; General Manager, Surface Transit; and Assistant General Manager, SIRTOA. The record clearly indicated that in three of the four cases, Plaintiff lacked primary qualifications for these positions, while the successful candidates met these qualifications. (Herman Aff. Ex. 5, 22, 23, 25, 30, 31; Def. Mem. In Support of Summ. J. at 16-17.) The Assistant General Manager position was never filled, however, Defendants have demonstrated that Plaintiff lacked the necessary qualifications for that job as well. (Herman Aff. Ex. 5, 27.)

Finally, Plaintiff sought two promotions for which he arguably may have been qualified. The first was his April 7, 1992 application for Senior Director, Labor Research and Negotiations. Plaintiff's application was rejected, however, the position was not filled until 1995 and was filled by a candidate who had previously been Director, Labor Research and Negotiations. Plaintiff also sought, on January 20, 1994, to be promoted to Director, Labor Relations. Defendants further refute Plaintiffs claim by stating that the successful applicant was a Black female, thus negating the charge of racial bias. (Herman Aff. ¶ 11.) Even assuming, arguendo, that Plaintiff could establish a prima facie case as to either of these promotion denials, Plaintiff has failed to prove that Defendants' non-discriminatory explanation for rejecting Plaintiff was were pretext.

Defendants have submitted ample documentation that hiring decisions were motivated by Plaintiff's declining job performance. There are a plethora of documents attesting to Plaintiff's less than stellar job performance. (Herman Aff. Ex. 3.) This evidence consists of a series of progressively poor performance evaluations, critical interoffice memoranda from Plaintiff's superiors, and letters of complaint from workers within the agency with whom Plaintiff interacted.

In contrast, Plaintiff has not offered any admissible evidence that racial animus was the cause of Defendants' failure to promote him and that Defendants' proffered explanations are mere pretext for such animus. Although Plaintiff testified in his deposition that he had "notes" of conversations he had overheard among NYCTA management staff, in which management allegedly made remarks indicating racial bias, Plaintiff did not respond to Defendants' request to produce the notes during discovery. (Roth Aff. Ex. 1 at 56-61; Def's Mem. In Support of Mot. For Summ. J. at 19-20.) Plaintiff also claimed to have a written "record" supporting his claim that unnamed white managers had been promoted while Plaintiff's multiple requests for promotion were denied, however, these records were also requested during discovery and Plaintiff failed to produce them. (Roth Aff. Ex. 1 at 61-63; Def's Mem. In Support of Mot. For Summary J. at 19-20.)

Defendants argue that Plaintiff is now precluded from offering these documents in support of his allegations. Federal Rule of Civil Procedure 37(c)(1) provides: "A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion, any witness or information not so disclosed." Fed. R. Civ. P. 37(c)(1). "A party opposing a motion for summary judgment simply cannot make a secret of

his evidence until the trial for in doing so he risks the possibility that there will be no trial." Meiri v. Dacon et al, 759 F.2d 989, 998 (2d Cir. 1985)(citing Donnelly v. Guion, 467 F.2d 290, 293 (2d Cir. 1972)). Plaintiff would clearly be precluded from using as evidence those requested materials which Plaintiff has withheld from his opponent. As Plaintiff has produced no admissible evidence in support of his allegations of racial discrimination, his bald assertions are insufficient to defeat the instant summary judgment motion.

D. Discriminatory Termination

To state a prima facie case of discriminatory termination, along with other requirements, Plaintiff must make a threshold showing that he was qualified to work at his position. See Gregory v. Daly, 243, F.3d 687, 696 (2d Cir. 2001). Plaintiff was terminated on May 23, 1995, after a year-long absence due to medical problems. Plaintiff testified that he has been unable to work since early 1994. (Roth Aff .Ex. 1 at 76-77.) Accordingly, the Court agrees with defendants' assertion that Plaintiff fails to state a prima facie case for discriminatory termination as a matter of law. Id.

E. Retaliation Claims

Section 704(a) of the Civil Rights Act of 1964 provides that "it shall be an unlawful employment practice for an employer to discriminate against any of his employees...because he has opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C. §2000e-3(a). "Title VII thus prohibits retaliatory adverse employment actions against an employee who opposes alleged discriminatory practices." Belgrave v. City of New York, 95 CV 1507, 1999 WL 692034, *31 (E.D.N.Y. Aug. 31, 1999).

Under the analysis directed by the United States Court of Appeals for the Second Circuit, a plaintiff established a prima facie case of retaliation by showing (1) participation in a protected activity known to the defendant; (2) and employment action adverse to the plaintiff; and (3) a causal connection between the protected activity and the adverse employment action. Torres v. Pisano, 116 F.3d 625,639 (2d Cir.), cert denied, 118 S.Ct. 563 (1997).

Essential to a successful retaliation claim is the third prong of the prima facie case requiring proof of a causal connection between the protected activity and the adverse employment action. "A plaintiff may establish proof of a causal connection indirectly by showing that the protected activity was followed closely by discriminatory treatment, or through other evidence such as disparate treatment of fellow employees who engaged in similar conduct, or directly through evidence of retaliatory animus directed against a plaintiff by a defendant." Id. (internal quotation marks and citations omitted).

Plaintiff alleges retaliatory failure to promote and retaliatory termination. Plaintiff has offered only conclusory allegations in support of his claims and has failed to meet his burden of presenting a prima facie case. Plaintiff has not shown that any person who made any employment decisions affecting Plaintiff was aware that he had filed an EEOC charge, nor has Plaintiff shown a temporal connection between the protected activity and the adverse employment actions. Plaintiff was terminated in 1995, long after his first EEOC charge was filed in 1993. Furthermore, Defendants have established that Plaintiff's termination was pursuant to a company policy of terminating employees who were absent from the workplace for more than one year. Plaintiff has clearly not met his burden, and there for, his retaliation claims must fail.

F. State and City Claim

Although Defendants claim that Plaintiff's state and city claims are time-barred by the applicable statute of limitations, the Court need not reach that determination. The Court has found each of Plaintiff's federal claims to be meritless, and therefore declines to exercise its discretion to entertain Plaintiff's pendant state law claims. "While a district court retains the discretion to exercise pendant jurisdiction and entertain state law claims one all federal claims have been dismissed, See Enercomp, Inc. v. McCorhill Publishing, 873 F.2d 536, 545 (2d Cir. 1989), generally "if the federal claims are dismissed before trial, ... the state claims should be dismissed as well." Maric v. St. Agnes Hosp. Corp., 65 F.3d 310, 314 (2d Cir. 1995)(citing United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1996)).[4]

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[4] As this Court has now disposed of each of Plaintiff's claims, the Court declines to reach the issue raised by Defendants as to whether MaBSTOA is a proper defendant in this action.

CONCLUSION

The Court concludes that Plaintiff has not raised any issues of material fact sufficient to preclude a finding of summary judgment in Defendants' favor. Accordingly, Defendants' Motion for Summary Judgment, pursuant to Fed. R. Civ. P. 56, is hereby GRANTED. The Clerk of the Court is Ordered to close this case.

SO ORDERED.

Dated: May 31, 2001
Brooklyn, New York

s/ Sterling Johnson, Jr.
U.S.D.J.

FILED
In Clerk's Office
U.S. District Court, E.D.N.Y.
June 8, 2001

BROOKLYN OFFICE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21st day of August, two thousand and two.

PRESENT:

HON. GUIDO CALABRESI,
HON. ROSEMARY S. POOLER
HON. ROBERT D. SACK,

Circuit Judges.

GLADSTONE FORD,
Plaintiff-Appellant,

v.

NEW YORK CITY TRANSIT AUTHORITY,
and MANHATTAN AND BRONX SURFACE
OPERATING AUTHORITY,
Defendants-Appellees.

For Plaintiff-Appellant:	GLADSTONE FORD, *pro se,* Brooklyn, New York
For Defendants-Appellees:	Barbara M. Roth, Torys, LLP New York, New York

A TRUE COPY
Roseann B. MacKechnie, CLERK

by s/_____
DEPUTY CLERK

ISSUED AS MANDATE: 9/11/02

Appeal from the United States District Court for the Eastern District of New York (Sterling Johnson, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is **AFFIRMED.**

Plaintiff-Appellant Gladstone Ford appeals from an entry of summary judgment by the United States District Court for the Eastern District of New York Sterling Johnson, Jr., *Judge*) on Ford's Title VII race discrimination and retaliation claims, which arise under 42 U.S.C. § 2000e.[1]

BACKGROUND

Gladstone Ford's ("Plaintiff") claims grow out of various purported incidents of race discrimination during the course of his employment with the Manhattan and Bronx Surface Transit Operating Authority (MABSTOA), a statutory subsidiary of the New York City Transit Authority (NYCTA) ("Defendants"). Plaintiff, an attorney admitted to the District of Columbia bar was hired in march 1989 by MABSTOA, as Manager of Labor Relations for the Staten Island Division,

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[1] Ford also brought claims under *** 29 U.S.C. § 206(d), and state *** Law. The district court granted *** to the defendants on the Equal *** and, having dismissed all *** action, declined to hear the *** claims.

Department of Buses. His duties included handling grievance appeals and arbitrations, and otherwise administering labor relations and labor contracts for the Staten Island Division. On the record before us, his performance was judged to be middling from the start, and spiraled downward from mid-1991 to 1994. During the same period, he applied for numerous high-level positions, but was offered none of them. Ford took leave for medical reasons on March 25, 1994, and never returned to work. A year later, MABSTOA notified Ford that, pursuant to MABSTOA policy, he would lose his position if he failed to return. He was subsequently terminated effective May 23, 1995.

Plaintiff's Performance Evaluations

Plaintiff's first MABSTOA performance evaluation, covering March 27, 1989 to March 27, 1990, rated him as "fully satisfactory," the second-to lowest category on a four-point scale. The next year, under new supervisors, George Governale and Frederick L. Herman, Plaintiff again received a "fully satisfactory," now the third rung out of five on a revised ratings scale. Governale and Herman remained Plaintiff's supervisors for most of the period under dispute. In 1992, Plaintiff received another "fully satisfactory," but was cited for "marginal" organization, planning and leadership abilities. This echoed earlier comments from Prendergast about Plaintiff's lack of initiative. Plaintiff's 1992 evaluation also referenced an irate internal memo accusing Plaintiff of blatantly undermining his client (Staten Island bus management) during an arbitration proceeding. This was one of many memos from colleagues and clients that, starting in June of 1991 and continuing for the balance of Plaintiff's tenure, registered assorted complaints about Plaintiff's performance: missed meetings and

arbitrations, failures to submit documents on time, submission of incomplete documents, inappropriate demeanor, inattention to facts, and more. Plaintiff's March, 1993 review downgraded him to "poor," the lowest possible rating, noting among other things some of these complaints. His final review, in March, 1994, also graded him "poor," and recommended his removal.

Plaintiff's Efforts to Secure Promotion

In 1991, Plaintiff started applying for senior positions within MABSTOA and NYCTA. Postings for many of these jobs required candidates to have years of management and/or specialized mass-transit experience. Though worldly and well educated, Plaintiff lacked the relevant years of learning-by-doing mandated in the postings.

Plaintiff's first target, in March of 1991, was the position of Assistant General Manager, Administration, Staten Island Division, which position was eliminated without being filled. On July 8, 1991, he put in his name for Chief Electrical Officer, the official in charge of all aspects of the signal, power distribution, and communication system for NYCTA' subways. The position was filled by a high-level manager from the Car Equipment Division, who previously oversaw maintenance and repair of the NYCTA's entire fleet of subway cars. On April 7, 1992, Plaintiff applied to be Senior Director, Labor Research and Negotiation, a position that went unfilled until 1995, some time after Plaintiff had stopped working, Not two months later, on May 28, Plaintiff entered his resume for the position of Labor counsel with the Metropolitan Transportation Authority, an entity whose personnel practices are *** To the Defendants'. Plaintiff's *** States that he applied on September *** Director, Surface Transit (Pl. Complaint ¶ 31). On October 20, 1992, Plaintiff sought the position of

General Manager, Bronx division, with budget responsibilities of $200 million and oversight of depots responsible for 1000 buses. The position was filled by an applicant who came from a similar position where he managed hundreds of buses, thousands of employees, and budgets in the hundred millions.

On May 10, 1993, Plaintiff applied to be Assistant General Manager, Staten Island Rapid Transit Operating Authority, a subsidiary of MTA. The position was eliminated due to corporate reorganization before being filled. Later that summer, Plaintiff tried for the position of General Manager, Surface Transit, Staten Island, but he had nowhere near the number of years of transport-industry and management experience stipulated for the job.

Early in 1994, Plaintiff sought to become Director, Labor Relations for Brooklyn. For Plaintiff, this position would have been a lateral transfer to a larger borough. The chosen applicant was a black woman who, unlike Plaintiff, was licensed to practice law in New York. This was the last of Plaintiff's applications, for on March 25, 1994, claiming job-related stress, Plaintiff took leave from work and did not return.

Plaintiff's Employment Discrimination Complaints

On March 20, 1992, Plaintiff registered charges against his supervisor, George Governale, with the internal Affirmative Action/Equal Employment Opportunity Office ("EEO") that served MABSTOA and NYCTA employees. Plaintiff complained that on account of race and color, Governale gave him low performance ratings, denied him promotions and raises, and generally prevented him from getting the high-level positions he had sought. On January 11, 1993, the EEO reported that its investigation uncovered no evidence of the alleged discrimination. A month later, on February 9, Plaintiff

filed the first of two charges with the federal Equal Employment Opportunity Commission (EEOC) against NYCTA. He claimed that he had always received "good" evaluations until a "new" manager was assigned to him, whereupon his evaluations plummeted and so too his prospects for raises and promotion.

The next EEOC filing came on April 14, 1994, nearly a month after Plaintiff had stopped working. Here again he claimed that on account of race he had been denied promotions and suffered poor evaluations, and to this he added that he had recently been threatened with "demotion and/or termination." On July 6, 1995, soon after his firing, Plaintiff amended his first EEOC complaint, positing race and retaliation as the reasons for his termination.

The Instant Lawsuit

The EEOC dismissed Plaintiff's charges on April 20, 1998, and he began the present action on July 16, of that year.

Two years into the proceedings, on June 9, 2000, the district court issued an order at the parties' behest revising the briefing schedule on Defendants' motion for summary judgment. This was the second extension granted, and the court stated that it would be the last. Under the new and final schedule. Defendants were to serve their motion for summary judgment by June 28, 2000. Plaintiff was to submit his papers in opposition by August 14, 2000, and Defendants were to file their reply by September 11, 2000. Defendants were punctual, serving their papers on June 28. Plaintiff was not, and on August 23, nine days after his papers were due, he sought the extension the court had warned would not be given. The district court denied the motion, on ground of (1) its previous, explicit order, and (2) the tardiness of Plaintiff's application. Plaintiff

thereupon submitted his opposition papers on August 29, fifteen days late, and they were, seemingly, accepted. Despite losing a full two weeks to Plaintiff's protraction, Defendants turned in their reply memo by the appointed date, September 11, 2000. In this reply, Defendants observed that Plaintiff had submitted neither admissible evidence or affidavits in opposition to Defendants' motion, nor a proper statement of facts, as required by Local Civil Rule 56.1. They noted that Plaintiff was obliged to "identify all alleged genuine issues of material fact to be tried, each of which 'must be followed by citation to evidence which would be admissible.'" Reply Mem. of Law in Supp. Of Defs.' Mot. For Summ. J. at 3. The purported 56.1 Statement, Defendants added, featured "not a single citation to anything." *Id.*

On September 21, ten days after Defendants had served their reply and four weeks after Plaintiff had filed his opposition papers, Plaintiff sought leave of the court to supplement his papers with a "small amount" of legal argument plus some "inadvertently" omitted exhibits. Letter from Thomas F. Bello to the Hon. Sterling Johnson, Jr., Sept. 21, 2000, at 1. Plaintiff justified the request with reference to "misunderstandings among counsel" about possible extensions beyond August 14 deadline for Plaintiff's opposition papers. *Id.* Defendants responded that such supplementation would "seriously" prejudice their case, as they had already served their reply papers. Letter from Barbara Roth to the Hon. Sterling Johnson, Jr., Sept. 25, 2000, at 2. The district court denied Plaintiff's request.

Throughout all this time, Plaintiff, who is in any event an attorney, was counseled.

On May 31, 2001, the district court granted the Defendants' motion for summary judgment. This appeal followed.

On appeal, Plaintiff argued first that the district court abused its discretion (1) in relying on certain affidavits from Frederick L. Herman, Plaintiff's erstwhile supervisor, and Barbara Roth, Defendants' attorney; (2) in allowing Defendants to use an unsigned copy of Plaintiff's deposition transcript; and (3) in barring Plaintiff from belatedly supplementing his papers in opposition to Defendants' motion for summary judgment. More broadly, Plaintiff contends that the district court mistakenly granted summary judgment to Defendants on Plaintiff's Title VII race discrimination and retaliation charges.

DISCUSSION

We review a district court's decisions respecting extensions of time in procedural matters for abuse of discretion, *Davidson v. Keenan,* 740 F.2d 129, 132 (2d Cir. 1984) (addressing Fed. R. Civ. P. 6(b)(2)), which is "one of the most deferential standards of review." *Raishevich v. Foster,* 247 F. 3d 337, 344 *2d Cir. 2001) (citation and internal quotation marks omitted).

A district court's grant of summary judgment we review *de novo*, with all evidence construed in the light most favorable to the nonmoving party. *Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown,* 294 F.3e 35, 45 (2d Cir. 2002). Summary judgment is in order, however, where "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Id.* *(citation and internal quotation marks omitted).

We consider first the court's refusal to allow Plaintiff to supplement his opposition papers. Fed. R. Civ. P. 6 governs extensions of time in relation to court orders. In relevant part, it provides that a court may "upon motion made after the

expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect." Fed. R. Civ. P. 6(b)(2). "[W]hether neglect is excusable in a particular case rests with the sound discretion of the district court." *Davidson,* 740 F.2d at 132 (citation and internal quotation marks omitted). In *Davidson*, because the nonmoving party failed to seek an extension prior to the motion return date, we sustained a trial judge's decision to exclude from consideration opposition papers to a motion to dismiss. *Id.* Though the appellants had proffered a plausible excuse–not being able to locate essential nonparty witnesses before the return date–we point out that this fact "does not explain why appellants failed to *request* additional time prior to" the court-set date. *Id.* at 132.

In the instant case, the first post-deadline extension was sought on the ground that Plaintiff's lawyer had been busy with another trial and deposition, i.e., the quotidian practice of law. Moreover, as in *Davidson,* nothing in the nature of the attorney's "excuse" prevented him from seeking a pre-deadline extension. Having submitted his opposition papers two weeks late, having benefitted from a de-facto extension, having reduced by half Defendants' time to file their reply, Plaintiff had no tenable basis for seeking leave to file a surreply, at least where the proffered excuse had nothing to do with anything new in Defendants' reply papers. The district court's denial of that leave lay well within its discretion.

Plaintiff tries to end-run the consequences of his omissions below by asking us to consider afresh whether the affidavits submitted with Defendants' motion for summary judgment were proper, and whether Defendants wrongly put into the record an unsigned copy of Plaintiff's deposition. Plaintiff had his chance to raise these questions in his

opposition papers and did not do so.[2] We decline to permit him to raise them at this late date. *See H. Sand & Co., Inc. v. Airtemp Corp.*, 934 F.2d 450, 455 (2d Cir. 1991) (treating as waived on appeal plaintiff's newfound objections to affidavits submitted with the defendants' motion to dismiss), *In re Teltronics Servs., Inc.*, 762 F.2d 185, 192 (2d Cir. 1985) ("[Appellant] waived any objection to the affidavit by failing to move to strike it.."); *cf. Van Praag v. Columbia Classics Corp.*, 849 F.2d 1106, 1110 (8th Cir. 1988) (holding that trial judge did not err in allowing use of unsigned depositions, where the objecting party had copies of the depositions and notice of the other party's intention to use them).

Plaintiff's Title VII retaliation and discrimination claims center on the nine occasions, described above, on which he applied for but did not receive high-level positions.[3] He claims also that his firing was in retaliation for his EEOC complaints. He did not, however, in his opposition papers, as required under Local Rule 56.1, traverse Defendants, explanation for these events. Under the circumstances, the district court correctly granted summary judgment. Even assuming, arguendo, that Plaintiff made out a prima facie case, he did not, as required, present evidence sufficient to permit a jury to find that Defendants' explanations were pretextual. *See Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 (2d Cir. 2000)

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[2] Plaintiff not only failed to do so, he tacitly accepted the unsigned deposition by repeatedly citing it in his opposition. *See* Mem. of Law in Opp'n to Defs.' Mot. For Summ. J., at 4,5,6,7,8.

[3] The sum total of Plaintiff's applications for promotions is slightly uncertain. Plaintiff's brief claims that he applied for "at least ten," but does not corroborate this number. Appellant's Br. At 2. Defendants and the trial court identify nine applications, which are the ones we consider here.

("The plaintiff must produce not simply some evidence, but sufficient evidence to support a rational finding that the legitimate, non-discriminatory reasons proffered by the defendant were false, and that more likely than not discrimination was the real reason for the employment action.") (citation and internal quotation marks omitted).

We have considered Plaintiff's remaining arguments and adjudge them meritless. Accordingly, the trial court's ruling is AFFIRMED.[4]

FOR THE COURT:
Roseann B. Mackechnie, Clerk

By: s/ Oliva M. George, Deputy Clerk

FILED
United States Court of Appeals
Second Circuit
Aug. 21, 2002

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[4] Our resolution of the Title VII claims renders moot Defendants' argument that we should dismiss the instant appeal due to the alleged noncompliance of Plaintiff's brief with the Federal Rules of Appellate Procedure.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---------- X

GLADSTONE FORD,

Plaintiff,

00 CV 3301 (SJ)

-against-

ORDER

UNITED STATES DEPARTMENT OF THE TREASURY INTERNAL REVENUE SERVICE, UNITED STATES OF AMERICA, OWCEN FEDERAL BANK, FSB, DIME SAVINGS BANK OF NEW YORK, FSB.

Defendants.

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APPEARANCES

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Attorney for the Government

JOHNSON, District Judge:

For the reasons stated on the record at the July 16th hearing, defendants' motion to dismiss is GRANTED. The Clerk of the Court is directed to close this case.

SO ORDERED.

s/ Johnson
U.S.D.J.

Dated: August 24, 2001
Brooklyn, New York

FILED
In the Clerk's Office
U.S. District Court E.D.N.Y.
Aug. 28, 2001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

_____X

GLADSTONE FORD,

Plaintiff,

JUDGMENT
00-CV-33-1 (SJ)

-against-

UNITED STATES DEPARTMENT OF THE TREASURY INTERNAL REVENUE SERVICE, UNITED STATES OF AMERICA, OWCEN FEDERAL BANK FSB, DIME SAVINGS BANK OF NEW YORK, FSB,

Defendants.

_____X

An Order of Honorable Sterling Johnson, United States District Judge, having been filed on August 28, 2001, granting defendant's motion to dismiss for the reasons stated on the record at the July 16, 2001 hearing; and directing the Clerk of the Court to close the case; it is

ORDERED and **ADJUDGED** that plaintiff take nothing of the defendants; and that defendant's motion to dismiss is granted.

Dated: Brooklyn, New York
September 13, 2001

FILED
In Clerk's Office
U.S. District Court, N.Y.
Sept. 12, 2001

CIVIL CAUSE FOR PRE TRIAL CONFERENCE

BEFORE JUDGE: JOHNSON, J.

DATE: July 16, 2001 **TIME:** 9:30 A.M.

DOCKET NUMBER: 00CV03301

TITLE: Ford v. U.S. Dept. Treasury, et al

COURT DEPUTY:

AUGUST MARZILIANO CR OR ESR: s/ Mike Picozzi

APPEARANCES:
FOR PLAINTIFF: Gladstone Ford
FOR DEFENDANT: Bonni Perlin, Esq.
Via Phone
Cynthia Butera–Dime Savings
Vincent Surico–Ocwen For Bank

☒ CASE CALLED

☒ COUNSEL FOR ALL SIDES PRESENT

☐ COUNSEL FOR

☐ HEARING HELD

☐ PRETRIAL CONFERENCE HELD

☐ PARTIES ADVISE THE COURT THAT THE CASE HAS BEEN SETTLED.

☐ CASE DISCONTINUED WITHOUT PREJUDICE AND WITHOUT COSTS.

☐ ALL DISCOVERY TO BE COMPLETED BY_____
DISCDDL

☐ JOINT PRE TRIAL ORDER TO BE FILED_____
PTRLODDL

☒ Deft's ___MOTION_ To Dismiss ARGUED

☐ MOTION HEARING HELD

☒ MOTION GRANTED

☐ MOTION DENIED

☐ MOTION GRANTED IN PART AND DENIED IN PART

☐ DECISION RESERVED

☐ DECISION READ INTO THE RECORD

☒ ORDER TO BE SUBMITTED BY__ The Court ☐

☐ MOTION HEARING ADJOURNED TO_____

☐ PRE TRIAL CONFERENCE SCHEDULED FOR_____
PTRLCNFDDL

☐ JURY TRIAL SCHEDULED FOR_____
JYTRLDDL

☐ BENCH TRIAL SCHEDULED FOR_____
BNTRLDDL

DOCKET CLERKS: PLEASE ENTER APPROPRIATE DEADLINES IF CHECKED OFF

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X
:
FORD,

00 CV 03301

Plaintiff,

-against- : United States Courthouse
Brooklyn, New York

U.S. DEPT. TREASURY, et al,

Defendants. : July 16, 2001
----------X 9:30 o'clock a.m.

TRANSCRIPT OF CONFERENCE
BEFORE THE HONORABLE STERLING JOHNSON, JR
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: GLADSTONE FORD, pro se

For the Defendant: VINCENT SURICO, ESQ.

CYNTHIA BUTERA, ESQ.

BONNI PERLIN, ESQ.
(Via Telephone.)

Court Reporter: Michael Picozzi
225 Cadman Plaza East
Brooklyn, New York
718-260-2547

Proceedings recorded by mechanical stenography, transcript produced by computer.

THE CLERK: Ford versus United States Department of Treasury.

MR. FORD: Gladstone Ford.

MS. BUTERA: Cynthia B U T E R A.

MR. SURICO: Vincent S U R I C O. Rockland Federal Bank

THE COURT: Is she on?

THE CLERK: Can you hear us on the telephone?

MS. PERLIN: Yes.

THE COURT: I will read my decision into the record. Plaintiff appearing pro se brings this action seeking relief from a New York State Supreme Court judgment of foreclose. Presently before the Court are defendants Dime Savings Bank of New York and the United States' motion to dismiss plaintiff's complaint for lack of subject matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b) (1), and for failure to state a claim, pursuant to Federal Rule 12 (b) (6).

For the reasons stated below, defendants' motions are granted.

In considering a motion to dismiss, the Court must accept as true all material factual allegations in the complaint and draw all inferences in favor of the pleader. See Mills versus Molecular Corp. 12 F.3d 1170, 1174, a Second Circuit 1993. Additionally, the Court recognizes that a plaintiff proceeding pro se must be given wide latitude and a court must make reasonable allowances so that a plaintiff does not forfeit his rights to virtue of his lack of legal training. See Smith versus Weinberger, P.C., 994 Fed. Supp. 418, 422 Eastern District New York 1998. A plaintiff's pro se status, however, does not exempt him from compliance with relevant rules of procedural and substantive law. See Ferran versus Town of Nassau, 11 F.3d 21, 22, Second Circuit, 1993.

With this backdrop in mind, the Court turns to the merits of defendants' motions to dismiss pursuant to 12(b) (1). Defendants contend that the Court should dismiss plaintiff's action because it lacks subject matter jurisdiction.

Under the Rooker-Feldman doctrine, a federal district court lacks subject matter jurisdiction over a case if the exercise of jurisdiction would result in the reversal or modification of a state court judgment. See Hachamovitch versus DeBuono 159 F.3d 693, Second Circuit 1998. Such jurisdiction is lacking because within in the federal system, only the United States Supreme Court has appellate jurisdiction to review a state court judgment. District courts are limited strictly to original jurisdiction. See Smith, 994 Fed. Supp. at 422-23. Under Rooker-Feldman, therefore, a plaintiff may not institute an action in federal district court that directly challenges the holding or decision of a state court.

Here, plaintiff mounts a direct challenge to the New York State Supreme Court's judgment of foreclose. Plaintiff's complaint seeks an order from this Court declaring that the New York State judgment of foreclosure is invalid. In light of

the discussion above, to adjudicate plaintiff's claim would run afoul of the Rooker-Feldman doctrine. Even if the state court judgment was wrongly procured by fraud, as plaintiff has alleged, it is effective and conclusive unless it is modified or reversed in the appropriate state appellate or collateral proceeding. See Simpson, 20 F. Supp. 2d at 633. Moreover, while plaintiff contends that the Rooker-Feldman doctrine is not a bar to an independent action brought under Federal Rule of Civil Procedure 60, that rule is inapplicable because it governs federal not state court actions. Accordingly, this Court lacks subject mater jurisdiction to entertain plaintiff's claim.

For the foregoing reasons, defendants' motions to dismiss are granted. Because the Court has determined it lacks subject matter jurisdiction, defendants' challenge pursuant to Federal Rule of Civil Procedure 12(b) (6) need not be addressed. Additionally, because the Court has the power sua sponte to dismiss an action for lack of subject matter jurisdiction, it now dismisses the action in its entirety as it relates to the remaining defendant.

MS. BUTERA: Thank you, Your Honor.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held a the United States Courthouse, Foley Square, in the City of New York, on the 8th day of November Two thousand and two.

PRESENT:

Hon. Richard J. Cardamone,
Hon. Roger J. Miner,
Hon. Robert A. Katzmann,
Circuit Judges.

----------X

Gladstone Ford,

Plaintiff-Appellant,

No. 02-6022

-v.-

United States Department of Treasury Internal Revenue Service, United States of America, Ocwen Federal Bank, FSB & Dime Savings Bank of New York,

Defendants-Appellees.

----------X

SUBMITTED FOR APPELLANT: Gladstone Ford, *pro se* Brooklyn, New York

SUBMITTED FOR APPELLEES: Thomas J. Clark, Esq., United States Department of Justice, Tax Division, Washington, D.C., for United States of America and United States Department of treasury Internal Revenue Service (Eileen J. O'Connor, Assistant Attorney General, and Robert J. Branman, on brief).

Andrew S. Fisher, Esq., Fisher & fisher, New York, New York, for Ocwen Federal Bank, FSB.

Michael P. Versichelli, Esq., Rivkin Radler LLP, Uniondale, New York, for Dime Savings Bank of New York, FSB.

Appeal from the United States District Court for the Eastern District of New York (Sterling Johnson, Jr., Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District court is **AFFIRMED.**

Gladstone Ford, *pro se* and *in forma pauperis*, appeals from the district court's dismissal, pursuant to Rule 12(b)(1) of the federal Arules of Civil Procedure, of his complaint for lack of subject matter jurisdiction under the Rooker-Feldman doctrine. See Rooker v. Fidelity Trust Co., 263 U.S. 413 (1932); District of Columbia court of Appeals v. Feldman, 460 U.S. 462 (1983).

On an appeal from a dismissal for lack of subject matter jurisdiction., pursuant to Rule 12(b)(1), we review the district court's factual findings for clear error and its legal conclusions *de novo*. See Luckett v. Bure, 290 F.3d 493, 496 (2d Cir. 2002).

The teachings of Rooker-Feldman and its progeny

require this Court to affirm the district court's dismissal of Ford's action against Dime and Ocwen. Ford's claims regarding the alleged fraud and the statute of limitations with respect to the foreclosure judgment are inextricably intertwined with the state court's underlying foreclosure judgment. See Phifer v. City of New York, 289 F.3d 49, 55 (2d Cir. 2002). In essence, Ford seeks a declaration that the foreclosure judgment is void, thereby requiring reversal of the state court foreclosure judgment. Ford has availed himself of all avenues of relief in state court, with the state court ruling against him in every instance. Ford now seeks relief from the state courts' decisions, and, as a result, is barred by Rooker-Feldman. The district court, therefore, properly dismissed the action against Dime and Ocwen.

Ford raises several additional arguments on appeal which we have considered, and find to be without merit.

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

s/ Lucille Carr

FILED
United States Court of Appeals
Second Circuit
Nov. 8, 2002

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK, N0007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 20th day of May two thousand three.

Ford

Dkt. No: 02-6022

v

U.S. Dept. of T

A petition for a panel rehearing and a petition for rehearing en banc having been filed herein by the appellant pro se Gladstone Ford.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active

service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk

By s/ Arthur M. Heller, Motions Staff Attorney

p o ccc
inbancdn_frm

FILED
United States Court of Appeals
Second Circuit
May 20, 2003

APPEAL DL-SET

U.S. District Court
New York Eastern (Brooklyn)

CIVIL DOCKET FOR CASE # 98-CV-4768

Ford v. New York City Transi, et al Filed: 07/17/98
Assigned to: Judge Sterling Johnson, Jr.
Referred to: Magistrate Marilyn Dolan Go
Demand: $0,000
Lead Docket: None
Dkt# in other court: None
Jury Demand: Defendant
Nature of Suit: 442
Jurisdiction: Federal Question

Cause: 42:2003 Job Discrimination

GLADSTONE FORD plaintiff	Thomas F. Bello [COR LD NTC] Thomas F. Bello, Esq., P.C. 387 Forest Avenue Staten Island, NY 10301 718-981-9191 Gladstone Ford 821 Hancock St., Apt. #1-L Brooklyn, NY 11233 718-268-9646
v.	
NEW YORK CITY TRANSIT AUTHORITY defendant	Barbara M. Roth [COR LD NTC]

Torys
237 Park Avenue
New York, NY 10017
(212) 880-6000

Evelyn Jonas
694-3892
[COR LD NTC]
New York City Transit
Authority
130 Livingston Street
Brooklyn, NY 11201
(718) 694-3891

MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY, (MABSTOA) defendant	Barbara M. Roth (See above) [COR LD NTIC]

Docket as of October 2, 2001 4:04 pm
Proceedings include all events.
1:98 cv4768 Ford v. New York City Transi, et ai
APPEAL DL-SET

GLADSTONE FORD

plaintiff

v.

NEW YORK CITY TRANSIT AUTHORITY;
MANHATTAN AND BRONX
SURFACE TRANSIT OPERATING
AUTHORITY, (MABSTOA)

defendant

Docket as of October 2, 2001 4:04 pm

APPEAL DL-SET

Proceedings include all events.
1:98cv4768 Ford v. New York City Transi, et al

7/17/98	1	COMPLAINT filed and summons (es) issued for New York City Transi, Manhattan and Bronx, FILING FEE $150.00 RECEIPT # 209115 (ac) [Entry date 07/17/98]
8/10/98	2	RETURN OF SERVICE executed as to New York City Transi, and Manhattan and Bronx on 8/5/98. Answer due on 8/25/98 for Manhattan and Bronx, and New York City Transit. (clp) [Entry date 08/13/98]
8/12/98	3	ANSWER to Complaint by New York City Transi, Manhattan and Bronx; jury demand. (clp) [Entry date 08/14/98]
10/15/98	4	Calendar entry: Case called on 10/15/98 for Initial Conference before Magistrate Go. Counsel for the parties present. The following rulings were made: 1. Automatic disclosers and authorizations must be completed by 11/5/98. 2. Applications for leave to amend and/or join other parties must be served by 12/31/98. 3. Factual Discovery must be completed by 5/15/99. (the parties anticipate have no experts). 4. The schedule for dispositive motions will be discussed at the next conference. Next Conference scheduled for 4/16/99 at 10:30. terminated past due deadlines (clp) [Entry date 10/20/98]

4/15/99	5	ORDER dated 4/12/99 granting the parties' application. Discovery is extended to 6/15/99 and next conference is adjourned to 6/16/99 at 11:00. Signed by Magistrate-Judge Marilyn D. Go. See letter dated 3/29/99 from Thomas F. Bello, Esq. to Mag. Go. (clp) [Entry date 04/15/99]
6/16/99	6	Calendar entry: Case called on 6/16/99 for Status Conference before Mag. Go. Counsel for the parties present. RULINGS: Discovery is extended to 8/15/99 for completion of the inspection of the remaining documents not produced by both sides. The parties should be prepared to discuss at the next conference. Next conference scheduled for 8/16/99 at 11:00. (clp) [Entry date 06/17/99]
8/16/99	7	Calendar entry: Case called on 8/16/99 for Status Conference before mag. Go. Counsel for the parties present. RULINGS: Pltf. Must provide the remaining documents by 8/31/99 and make a settlement demand in advance of the next conference. Next conference scheduled for 8/31/99 at 3:00. (clp) [Entry date 08/20/99]
8/31/99	8	Calendar entry: Before Magistrate Judge Go–status conference held. Settlement discussions have reached an impasse. Discovery must be completed by 10/29/99. Next conference set for 11/5/99 at 11:30. (lr) Entry date 09/01/99]

10/13/99 9 ORDER directing that the 11/5/99 conference is adjourned to 11/16/99 at 11:30. Signed by Magistrate-Judge Marilyn D. Go on 10/7/99. See letter 10/6/99 from Evelyn Jonas, Esq. to Mag. Go. (clp) Entry date 10/13/99]

11/16/99 10 Calendar entry: Case called on 11/16/99 for Status Conference before mag. Go. Counsel for the parties present. RULINGS: Plaintiff must deliver the documents within on week. Any re-examination of the plaintiff and deposition of the former employee of deft. must be taken by 12/17/99. Next conference scheduled for 12/20/99 at 4:00. (clp) Entry date 11/22/99]

12/20/99 11 Calendar entry: Case called on 12/20/99 for Status Conference before Mg. Go. Counsel for the parties present. RULINGS: Discovery is extended to 1/17/00 only for the purposes of resolving all outstanding discovery issues. Deft. 's pre-motion letter is due 2/17/00 and plaintiff's opposition is due 2/24/00. The parties were warned that no extension will be granted. (Clp) Entry date 12/27/99]

1/11/00 12 SCHEDULING ORDER setting a Status conference at 9:30 on 3/2/00 before Judge Johnson. Signed by Judge Sterling Johnson Jr., on 12/29/99. (clp) Entry date 01/11/0]

2/15/00 13 NOTICE of attorney appearance for Manhattan and Bronx, New York City Transit by Barbara M. Roth. (clp) [Entry date 02/16/00]

2/18/00	14	LETTER dated 2/17/00 from Barbara M. Roth to SJ: setting forth the basis for defts' motion for summary judgment dismissing pltff's claims. (This document returned to SJ's chambers, attn: Sharon Taylor) (jag) [Entry dated 03/10/01]
3/8/00	16	Calendar entry: Case called on 3/8/00 for Conference before Judge Johnson. Parties hold Conf. With Courtroom Deputy. Deft.'s motion for Summary Judgment to be filed by 5/18/00. Plaintiff to respond by 6/22/00. Deft. to reply by 7/6/00. The Court has set a pretrial conference for 9:30 on 11/9/00 before Judge Sterling Johnson Jr., (clp) [Entry date 03/14/00]
3/14/00	15	ORDER: Pltf. To respond to Deft.'s request for leave to file for summary judgment no later than 3/8/00. Parties are directed to appear at status conference in Court Room on 3/8/00 at 12:45. Signed by Judge Sterling Johnson Jr., on 3/1/00. (See faxed copy of letter dated 2/29/00 from Thomas F. Bello, Esq. to Judge Johnson) (clp) [Entry date 03/14/00]
3/22/00	17	LETTER sent to docketing dated 3/8/00 from Todd L. Schkeifstein, Esq. to Judge Johnson setting forth the briefing schedule for Deft.'s motion for summary judgment. (clp) [Entry date 03/22/00]

5/22/00	18	ORDER granting the parties request to revise the schedule for degts.' motion for summary judgment. New Motion: 6/7/00; Opposition: 7/24/00; Reply: 8/7/00. Signed by Judge Sterling Johnson Jr., on 5/3/00. (See letter dated 5/2/00 from Barbara M. Roth, Esq. to Judge Johnson) (clp) [Entry date 05/22/00]
6/16/00	19	ENDORSED ORDER granting modification in the briefing schedule for summary judgment motion. As this modification enlarges the briefing schedule by two months from the original date, and is parties second extension, no further extensions will be granted in this matter. Parties to adhere to this schedule (see letter dated 6/7/00 from Barbara Roth, counsel for defendants, to Judge Johnson). Signed by Judge Sterling Johnson Jr. on 6/9/00. (ar) [Entry date 06/16/00]
6/28/00	25	MOTION by Manhattan and Bronx, New York City Transi for summary judgment. Motion file stamped: 9/11/00 and mailed /served: 6/28/00. (clp) [Entry date 09/125/00]
6/28/00	26	Rule 56.1 Statement (formerly Rule 3(g) by Manhattan and Bronx, New York City Transi re: [25-1] motion for summary judgment. Motion file stamped: 9/11/00 and mailed/served: 6/28/00. (clp) [Entry date 09/25/00]

6/28/00 27 MEMORANDUM by Manhattan and Bronx, New York City Transi in support of [25-1] motion for summary judgment. Motion file stamped: 9/11/00 and mailed/served: 6/28/00 (clp) [Entry date 09/25/00]

6/28/00 28 AFFIDAVIT on Frederick L. Herman on behalf on Manhattan and Bronx, New York City Transit in support of [25-1] motion for summary judgment. (clp) [Entry date 09/25/00]

6/28/00 29 AFFIDAVIT by Barbara M. Roth on behalf of Manhattan and Bronx, New York City Transit in support of [25-1] motion for summary judgment. Motion file stamped: 9/11/00 and mailed/served: 6/28/00. (clp) [Entry date 09/25/00]

6/28/00 30 AFFIDAVIT by Frederick L. Herman on behalf of Manhattan and Bronx, New York City Transit in further support of [25-1] motion for summary judgment. Motion file stamped: 9/11/00 and mailed/served: 6/28/00. (clp) [Entry date 09/25/00]

6/28/00 31 Rule 56.1 Statement (formerly Rule 3(g) by Gladston Ford re: [25-1] motion for summary judgment. Motion file stamped: 9/11/00 and mailed/served: 6/28/00. (clp) [Entry date 09/25/00]

6/28/00 32 MEMORANDUM by Gladstone Ford in opposition for [25-1] motion for summary judgment. Motion file stamped: 9/11/00 and mailed/served: 6/28/00. (clp) [Entry date 09/25/00]

6/28/00 33 RESPONSE by Manhattan and Bronx, and New York City Transit to Plaintiff's [31-1] statement pursuant to Local Rule 56.1 (clp) [Entry date 09/25/00

6/28/00 34 REPLY MEMORANDUM OF LAW by Manhattan and Bronx, New York City Transit JJ in further support of its [25-1] motion for summary judgment. (clp) [Entry date 09/25/00]

7/12/00 20 LETTER sent to docketing dated 6/28/00 from Barbara M. Roth, Esq. to Thomas F. Bello, Esq. enclosing deft.'s notice of motion for summary judgment and supporting papers. Encls. Not attached to this copy) (clp) [Entry date 07/12/00]

8/30/00 21 ORDER denying plaintiff's request for additional time to respond to Deft.'s motion for summary judgment. Application received after due date and previous order indicated no further extensions would be granted. Parties are directed to negotiate remaining briefing time such that fully briefed motion is filed on time with the Court. Signed by Judge Sterling Johnson Jr., on 8/25/00. (See faxed copy of letter dated 8/23/00 from Thoms F. Bello, Esq.

to Judge Johnson) (clp) [Entry date 08/30/00]

9/1/00 22 LETTER sent to docketing dated 8/24/00 from Jonathan L. Being, Esq. to Judge Johnson written to alert the Court to and anticipated problem in complying with the briefing schedule ordered by the Court for defts. Motion for summary judgment. (Exhibit A and B attached) (clp) [Entry date 09/01/00]

9/1/00 23 LETTER sent to docketing dated 8/24/00 from Jonathan L. Bind, Esq. to Judge Johnson written on behalf of Defts. NYC Transit Authority and Manhattan and Bronx Surface Transit Operating Authority written to raise their concern that we might be prejudiced by the failure of plaintiff's counsel either to serve opposition papers by the date set by the Court. (clp) [Entry date 09/01/00]

9/18/00 24 LETTER sent to docketing dated 8/23/00 from Thomas F. Bello, Esq. to Judge Johnson written on behalf of the Pltf. To request additional time to respond to Deft.'s motion for Summary Judgment. (cp) [Entry date 09/18/00]

11/3/00 35 ORDER denying plaintiff's request to supplement its opposition papers on deft.'s motion for summary judgment. The Court will accept no further submissions on the matter. Signed by Judge Sterling Johnson Jr., on 10/17/00. (See letter dated 9/21/00 from Thomas F. Bello, Esq. to Judge Johnson) (clp) [Entry date 11/03/00]

11/6/00	36	LETTER sent to docketing dated 9/25/00 from Barbara M. Roth, Esq. to Judge Johnson written on behalf of defts, in opposition to plaintiff's request to supplement its opposition papers to deft.'s summary judgment motion. (clp) [Entry date 11/06/00]
11/9/00	37	Calendar entry: Case called on 11/9/00 for Pre trial conference before Judge Johnson. Counsel for the parties present. Further pretrial conference set for 9:30 on 2/28/01 before Judge Sterling Johnson Jr. (clp) [Entry date 11/27/00]
2/28/01	38	Calendar entry: Case called on 2/28/01 for Pre trial Conf. Before Judge Johnson. Counsel for the parties present. Conf. Held, Further pretrial conference for 9:30 on 4/25/01 before Judge Sterling Johnson, Jr. Court Reported/ESR M. Brymer. (clp) [Entry date 03/13/01]
6/1/01	41	Calendar entry: Case called on 6/1/01 for Pre-trial conf. Before, Judge Johnson. Counsel for the parties present. RULINGS: Decision to be mailed out on Summary Judgment Motion. The Court has set a further pretrial conference for 9:30 on 9/19/01 before Judge Sterling Johnson Jr. (clp) [Entry date 06/18/01]
6/8/01	39	MEMORANDUM and ORDER: The Court concludes plft. Has not raised any issues of material fact sufficient to preclude a finding a motion for summary judgment, pursuant to Fed. R. Civ. P. 56, is granted. Signed by Judge Sterling Johnson, Jr., on 5/31/01. c/m by

chambers. Forwarded to Pro-Se for Judgment. (clp) [Entry date 06/08/01]

6/13/01 40 JUDGMENT for Manhattan and Bronx, New York City Transit against Gladstone Ford. Defendants' motion for summary judgment is granted. Plaintiff shall take nothing of the defendant. (Signed by Clerk of Court on 6/11/01 c/m by docketing. (ar) [Entry date 06/13/01]

6/13/01 – Case closed as per doc. #40. (ar) [Entry date 06/13/01]

7/20/01 42 MOTION by Gladstone Ford to extend time to appeal. Forwarded to chambers. (jag) [Entry date 08/06/01

7/20/01 44 NOTICE OF APPEAL by Gladstone Ford [40-1] judgment order. Pltff., notified by mail to remit fee or complete request to waive filing fee. (lizv) [Entry date 09/17/01]

8/7/01 43 Notice of change of address, dtd. 8/1/01, from Ralph Vega Jr., to Pro Se Docket Clerk, that Pltff Gladstone Ford should be included in the docket sheet, even though he is registered as having counsel in this case. Docket sheet updated. (mrl) [Entry date 08/07/01

9/17/01 – Endorsed order granting [42-1] motion to extend time to appeal (signed by Judge Sterling Johnson Jr., on 8/10/01) (lizv) [Entry date 09/17/01]

9/18/01	–	Certified and transmitted record on appeal to U.S. Court of Appeals: [44-1] appeal. Record consists of doc# 1-43. Missing doc# 37, 43. Acknowledgment requested. (lizv) [entry date 09/18/01]
9/21/01	45	LETTER dated 9/5/01 from Jonathan L. Bing to Judge Johnson, confirming that the parties do not need to appear for their previously scheduled 9/19/01 Status conf. (lr) [Entry date 09/21/01]
9/26/01	–	USCA appeal fees received: [44-1] appeal fee paid $105.00 Receipt # 250123. Copy fwded to USCA. (lizv) [Entry date 09/26/01]

Docket as of October 2, 2001 4:04 pm